TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 494. 201.

ALFRED V. BOOTH, PLAINTIFF IN ERROR,

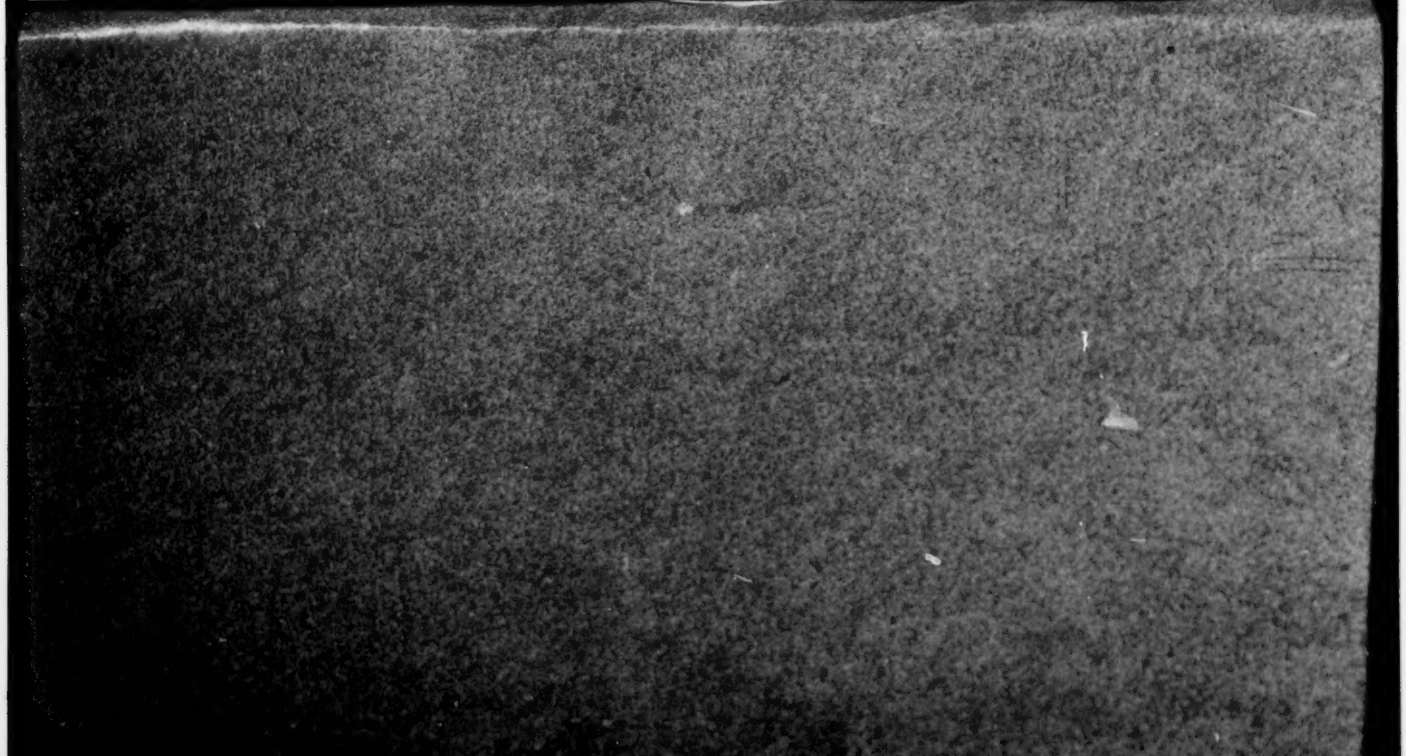
vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED NOVEMBER 26, 1900.

(17,979.)



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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 12, 1901.

a UNITED STATES OF AMERICA, 88:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Illinois, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Alfred V. Booth, plaintiff in error, and The People of the State of Illinois, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Con-
b stitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Alfred V. Booth, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventeenth day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

BROWN,
Associate Justice of the Supreme Court of the United States.

c In the Supreme Court of Illinois.

ALFRED V. BOOTH
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 1341. Error to Criminal Court, Cook.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the twenty-second day of October, in the year of our Lord one thousand nine hundred, a copy of the foregoing writ of error for the defendants in error was lodged in my office, at Springfield, Illinois.

Witness my hand and the seal of said court this 22nd day of October, A. D. 1900.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

{ Ten-cent United States internal-revenue stamp, canceled 10, 22, '00. C. M. }

d UNITED STATES OF AMERICA, *ss*:

To the People of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein Alfred V. Booth is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this seventeenth day of October, in the year of our Lord one thousand nine hundred.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

e I accept service of within citation this 24 day of October, 1900.

E. C. AKIN,
Att'y Gen'l of Illinois.

f In the Supreme Court of Illinois.

ALFRED V. BOOTH
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 1341. Error to Criminal Court, Cook.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the twenty-second day of October, in the year of our Lord one thousand nine hundred, a copy of the foregoing citation was lodged in my office at Springfield, Illinois.

Witness my hand and the seal of said court this 22nd day of October, A. D. 1900.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

{ Ten-cent United States internal-revenue stamp, canceled 10, 22, '00. C. M. }

g In the Supreme Court of Illinois.

ALFRED V. BOOTH
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 1341. Error to Criminal Court, Cook.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following papes, numbered from one (1) to seventy-nine (79), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled, and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this 22nd day of October, in the year of our Lord one thousand nine hundred.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

{ Ten-cent United States internal-revenue stamp, canceled 10, 22, '00. C. M. }

1 At a supreme court begun and held at Springfield, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: James H. Cartwright, chief justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Jesse J. Phillips, justice; Joseph N. Carter, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the third day of April, A. D. 1900, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the criminal court of Cook county; which said transcript is in the words and figures following, viz:

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court house, in the city of Chicago, in said county, on the first Tuesday (being the second day) of January, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Jonas Hutchinson, judge of the superior court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

Be it remembered, to wit, on the second day of January, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

It appearing to the court that public justice requires that a grand jury be selected and summoned for the next term of this court in accordance with the statute in such case made and provided,
3 the *the* court of its own motion doth order that the jury commissioners of Cook county do, at least twenty days before the first day of the next term of this court, select forty persons possessing the qualifications of jurors required by law to serve as grand jurors at said term, and that said commissioners shall, within five days after such selection, certify the person- so selected as grand jurors to the clerk of this court, who shall issue and deliver to the sheriff of Cook county, at least ten days before the next term of this court, a summons commanding said sheriff to summon the persons so selected, as aforesaid, to appear before this court at the hour of ten o'clock on the third Monday of the next term hereof, to constitute a grand jury for such term.

It is further ordered by the court that the clerk of this court transmit a certified copy of this order to said jury commissioners forthwith.

4 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court house, in the city of Chicago, in said county, on the first Monday (being the fifth day) of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Frank Baker, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

And afterwards, to wit, on the 19th day of February, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

The sheriff of Cook county returned into court the *venire facias* heretofore issued for a grand jury for this term and returnable today, by which it appears that the following-named persons have been duly summoned to appear this day and serve as grand jurors at the present term of this court:

5 Robert H. Bulkley, William L. Exley, Augustus R. Beard, W. W. McFarland, Mac R. Fife, Edward P. King, Eugene N. Carter, John W. Low, Wm. H. T. Collins, Stanley Flutwood, Arthur C. Hutchinson, William S. Gilbreath, David K. Hill, Jas. T. Quinn, Harry Cook, John F. Joyce, Edward H. Foreman, Jas. C. Lynch, Frederick C. Vass, Andrew Jaicks, Herbert R. Lloyd, Frank L. Eastman, Joseph Easthope; who answered to their respective names. The panel of grand jurors being now filled, the court having now here appointed David K. Hill, Esquire, foreman of said grand jury, the grand jurors aforesaid were duly sworn and charged by the court, and thereupon retire to consider of their presentment.

6 And afterwards, to wit, on the 3rd day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

The grand jury came into open court and made a presentment, endorsed "A true bill," in the following-entitled cause, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS } 58013. Indictment for
vs. } Contract to Give Him-
ALFRED V. BOOTH. } self an Option, etc.

7 STATE OF ILLINOIS, } *ss.*:
County of Cook, }

Of the February term of the criminal court of Cook county, in said county and State, in the year of our Lord one thousand nine hundred.

The grand jurors chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract to have to himself the option to buy at a future time certain commodity, to wit, grain, contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

8 The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid do further present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract to have to himself the option to buy at a future time a certain commodity, to wit, grain, to wit, ten thousand bushels of corn, contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

9 The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid do further present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract to give to himself the option to buy at a future time certain commodity, to wit, grain, contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

10 The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid do further present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract to give to *him to* himself the option to buy at a future time certain commodity, to wit, grain, to wit, ten thousand bushels

of corn, contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

11 The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid do further present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract with Weare Commission Company, a corporation, to give to himself, to wit, to said Alfred V. Booth, an option, to wit, preference to buy at a future time certain commodity, to wit, grain, to wit, ten thousand bushels of corn, contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

12 The grand jurors chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the *the* authority of the People of the State of Illinois, upon their oaths present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract in writing with Weare Commission Company, a corporation, to then and there have to himself, to wit, to said Alfred V. Booth, a certain option to buy at a future time, to wit, on or before the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, a certain commodity, to wit, grain, to wit, ten thousand bushels of corn, from the said Weare Commission Company, a corporation, as aforesaid; which said contract is in the words and figures as follows, to wit:

B. "Alfred V. Booth, grain and provision broker.

10 Weare Com. Co. CHICAGO, *August* 16, 1899.

Sep. corn, 1899. C., 31½. Paid.

Good till close of 'change, Sat., Aug. 26, 1899.

WEARE C. CO.
J. J. C."

contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

13 The grand jurors chosen, selected, and sworn in and for the county of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that Alfred V. Booth, late of the county of Cook, on the sixteenth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract in writing with Weare Commission Company, a corporation, to then and there give to himself, to wit, to said Alfred V. Booth, a certain option to buy at a future time, to wit, on or before the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and ninety-nine,

a certain commodity, to wit, grain, to wit, ten thousand bushels of corn, from the said Weare Commission Company, a corporation, as aforesaid, *as foresaid;* which said contract is in the words and figures as follows, to wit:

B. "Alfred V. Booth, grain and provision broker.

10 Weare Com Co. CHICAGO, *Aug.* 16, 1899.

Sept. corn, 1899. C., 31½. Paid.

Good till close of 'change, Sat., Aug 26, 1899.

WEARE C. CO.
J. J. C."

contrary to the statute and against the peace and dignity of the same People of the State of Illinois.

CHARLES S. DENEEN,
State's Attorney.

14 Term No., 3221; No. 58013. Copy. Criminal court of Cook county, February term, 1900. The People of the State of Illinois *vs.* Alfred V. Booth. Indictment for contract to give himself an option, &c. A true bill. David K. Hill, foreman of the grand jury. Witnesses, John C. Carmody, Henry L. Foster, W. E. Cayler. Filed March 3, 1900. Patrick J. Cahill, clerk. Bail, $1,000.

15 And afterwards, to wit, on the 3rd day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS } 58013. Indictment for
vs. } Contract to Give Him-
ALFRED V. BOOTH. } self an Option, etc

Whereupon it is ordered that the People's writ of capias issue against the body of said defendant in the above-entitled cause, returnable forthwith.

16 *Forthwith Capias.*

STATE OF ILLINOIS, }
Cook County, } *ss:*

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you take the body of Alfred V. Booth, if to be found in your county, and safely him keep so that you have him before our criminal court of Cook county forthwith to answer unto the People of the State of Illinois upon an indictment for contracting to give himself an option to buy at a future time grain, lately preferred against him by the grand jury of said court.

And have you then and there this writ.

Witness Patrick J. Cahill, clerk of our said court, and [SEAL.] the seal thereof, at Chicago, in said county, this 3rd day of March, A. D. 1900.

PATRICK J. CAHILL, *Clerk.*

17 Term No., 3221; term, 58013. Criminal court of Cook county, February term, A. D. 1900. Forthwith capias. The People of the State of Illinois *versus* Alfred V. Booth.

Executed this writ by arresting the within-named Alfred V. Booth and bringing his body into court this 5th day of March, A. D. 1900.

Fees.

Arrest	$2.00
Mileage	1.00
Return	.10
Total	$

ERNEST J. MAGERSTADT, *Sheriff.*
By JOHN A. KING, *Deputy.*

Bail, $1,000.

Received from the clerk at — o'clock — m., March 5, 1900.
ERNEST J. MAGERSTADT, *Sheriff.*

18 And afterwards, to wit, on the 3rd day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS *vs.* ALFRED V. BOOTH. } 58013. Indictment for Contract to Give Himself an Option, etc.

On motion of Charles S. Deneen, State's attorney, it is ordered that the said defendant be held to bail in the penal sum of one thousand dollars, with good and sufficient sureties, to be approved by this court, and in default thereof he be remanded into the custody of the sheriff of Cook county.

19 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court house, in the city of Chicago, in said county, on the first Monday (being the fifth day) of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Axel Chyrans, judge of the superior court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

Be it remembered, to wit, on the fifth day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS }
vs. } No. 58013. Recognizance.
ALFRED V. BOOTH, JOHN ROBSON, LEE D. MATHIAS. }

This day come Alfred V. Booth, as principal, and John
20 Robson and Lee D. Mathias, as sureties, and severally acknowledged themselves to owe and be indebted unto the People of the State of Illinois in the penal sum of one thousand dollars, to be levied of their goods and chattels, lands and tenements, respectively; yet to be void on the condition that the said Alfred V. Booth shall personally be and appear before the criminal court of Cook county, now in session, on the 6th day of March, A. D. 1900, and from day to day and from term to term and from day to day of each term until the final sentence or order of said court, to answer unto the People of the State of Illinois upon an indictment for contract to give himself an option, etc., now pending in said court against him, and abide the order of said court and not depart the same without leave; otherwise to be and remain in full force and effect.

21 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss.:
Cook County, }

Pleas before a branch of the criminal court of Cook county, in said county and State, at a term thereof begun and held at the criminal court house, in the city of Chicago, in said county, on the first Monday (being the sixth day) of March, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

Present: Honorable Arba N. Waterman, judge of the circuit court of Cook county and *ex officio* judge of the criminal court of Cook county; Charles S. Deneen, State's attorney; Ernest J. Magerstadt, sheriff of Cook county.

Attest: PATRICK J. CAHILL, *Clerk.*

And afterwards, to wit, on the 16th day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS } 58013. Indictment for
vs. } Contract to Give Himself an Option, etc.
ALFRED V. BOOTH. }

This day come the said People, by Charles S. Deneen, State's attorney; and the said defendant, as well in his own proper person as by his counsel, also comes; and counsel for said defendant
22 now here moves the court to quash the indictment in this cause.

And the court, hearing counsel in support of the motion as well as in opposition thereto and being fully advised in the premises, doth overrule said motion and order that said motion to quash the indictment in this cause be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

And he having been furnished with a copy of the indictment in this cause and lists of the names of the witnesses and jurors, and he being now here duly arraigned and forthwith demanded of and concerning the crime alleged against him in said indictment, how he will acquit himself thereof, for a plea in that behalf says that he is not guilty in manner and form as charged therein; and of this he puts himself upon the count-y; and the said People do the like.

And now, issue being joined, the said defendant and his counsel now here propose to waive the intervention of a jury and submit this cause to the court for trial.

And the court having fully advised the said defendant of his right to a trial by a jury, he still adhe*ars* to his proposition to waive said

right; and, by agreement of the State's attorney and the said defendant and his counsel, this cause is submitted to the court for trial and the intervention of a jury waived.

And, the court hearing testimony of witnesses, it is ordered that the further consideration of this cause be, and the same is hereby, postponed.

23 And afterwards, to wit, on the 26th day of March, in the year last aforesaid, it being the term of court aforesaid, the following, among other, proceedings were had and entered of record in said court; which said proceedings are in the words and figures following, to wit:

THE PEOPLE OF THE STATE OF ILLINOIS *vs.* ALFRED V. BOOTH.	58013. Indictment for Contract to Give Himself an Option, etc.

This day come the said People, by Charles S. Deneen, State's attorney, and the said defendant, as well in his own proper person as by his counsel, also comes.

And the court, hearing the arguments of counsel and being now fully advised in the premises, doth find the said defendant guilty.

And counsel for said defendant now here moves the court for a new trial in this cause.

And the court, hearing counsel in support of said motion, as well as in opposition thereto, and being now fully advised in the premises, doth overrule said motion, and order that the motion for a new trial in this cause be, and the same is hereby, overruled accordingly.

To which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

And counsel for said defendant now here moves the court in arrest of judgment in this cause.

And the court, hearing counsel in support of said motion, as well as in opposition thereto, and being fully advised in the prem-
24 ises, doth overrule said motion, and orders that said motion in arrest of judgment be, and the same is hereby, overruled accordingly; to which order of the court in overruling said motion the said defendant, by his counsel, now here excepts.

And now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not be pronounced against him on the finding of guilty heretofore rendered to the indictment in this cause—

Therefore it is ordered and adjudged by the court that the said defendant be fined in the sum of one hundred dollars and pay all the costs of these proceedings.

To which order and judgment of the court the said defendant, by his counsel, now here excepts, and prays an appeal to the supreme court of the northern grand division of Illinois, which is granted upon the condition that the said defendant doth within thirty days from date file an appeal bond in the penal sum of four hundred dollars, with sureties to be approved by this court, and also doth

within thirty days from date prepare and file his bill of exceptions in this cause.

25 And afterwards, to wit, on the 31st day of March, in the year last aforesaid, it being the term of court aforesaid, there was filed in the office of the clerk of the criminal court of Cook county a certain bill of exceptions; which said bill of exceptions is in the words and figures following, to wit:

26 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

THE PEOPLE OF THE STATE OF ILLINOIS } 3221.
vs.
ALFRED V. BOOTH. }

Bill of Exceptions.

Be it remembered that heretofore, to wit, upon the sixteenth day of March, A. D. 1900, the above-entitled cause came on for trial before Honorable Arba N. Waterman, one of the judges of said court, a jury being expressly waived in writing by the defendant, and the cause submitted to the court.

Messrs. Howard O. Sprogle and W. E. Caylor appearing as attorneys on behalf of the People; Lee D. Mathias, Esq., appearing as attorney on behalf of the defendant.

Whereupon the defendant, by his counsel, moved in writing to quash the indictment herein in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

STATE OF ILLINOIS }
vs.
ALFRED V. BOOTH. }

27 Comes now the defendant, by Lee D. Mathias, his attorney, and moves to quash the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment against the said defendant herein and each and every count thereof, both separately and severally, for the following reasons, to wit:

1. That the said counts or any of them charge no offense against the peace and dignity of the People of the State of Illinois.

2. That the said counts or any of them charge no offense contrary to the statute.

3. That the said counts or any of them charge no offense contrary to the statute and against the peace and dignity of the People of the State of Illinois.

4. That the statute, to wit, section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time grain or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void," upon which said section each and all of the aforesaid counts of the said indictment are based, is unconstitutional and void, being in contravention of section 2, article 2, of the constitution of the State of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law."

5. That the statute, to wit, section 130 of the Criminal Code,
28 in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void," upon which said section each and all of the aforesaid counts of the said indictment are based, is unconstitutional and void, being in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America in so far as it provides, "nor shall any State deprive any person of life, liberty or property without due process of law."

6. That the statute, to wit, section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year or both, and all contracts made in violation of this section shall be con*dis*ered gambling contracts and shall be void," upon which said section each and all of the aforesaid counts of the said indictment are based, is unconstitutional and void, being in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America in so far as it provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

7. That the court has no jurisdiction herein.

29 LEE D. MATHIAS,
Attorney for Defendant.

Which motion the court then and there overruled; to which ruling of the court the defendant, by his counsel, then and there duly excepted.

Whereupon the defendant was arraigned and pleaded not guilty.

Whereupon the People, to maintain the issue upon their part, by their counsel, introduced the following evidence:

HENRY L. FOSTER, produced as a witness on behalf of the People, having first been duly sworn, testified as follows:

My name is Henry L. Foster, and I reside at 437 Center street, Chicago, Illinois. I am acquainted with the defendant, Alfred V. Booth, and have known him about six years. I know his handwriting.

Whereupon Mr. Caylor asked the witness to describe a call, and the witness answered:

A man who buys a call pays a specific sum of money for the privilege of buying certain described goods, as agreed upon between buyer and seller, during the pendency of a certain time or at its conclusion at a certain price.

Q. Now, what is a put?

A. A put is the reverse of it—that is, a man who buys a put buys a privilege to deliver goods, also at a certain price, during the pendency or at the conclusion of a certain time.

(By the COURT:)

Q. A straddle is both of these things together, isn't it?

A. Well, your honor, I never dealt in one and I never saw one dealt in, and I would rather not endeavor to define it.

Whereupon Mr. Sprogle asked the witness the following question-:

Q. Mr. Foster, what is that card (handing card to witness)?

A. That card, sir, is a contract between an unnamed buyer and the Weare Commission Company by which the buyer received from them the privilege of calling 10,000 bushels of corn at 31½ cents at any time between the date of August 16th and August 26th, terminating August 26th.

Q. Do you recognize the handwriting of anybody on that card?

A. I do, sir.

Q. Whose?

A. Mr. Booth's.

(By the COURT:)

Q. That is the defendant?

A. That is the defendant.

Q. You are a member of the board of trade?

A. Yes, sir.

Q. And you understand what the marks and figures on this card here signify?

A. Yes, sir.

Q. And you have stated what they signify?

A. A positive call contract for a call. The C. itself, if you will allow me to show it to you, means call.

Q. Yes; I understand.

A. Ten means 10,000. The Weare Commission Company is the house that sold it.

Q. Yes.

A. Call, 31½ for cents, good in Chicago, August 16th to August 26th.

Q. Now, where is the signature?

A. The signature? There it is, accepted by the Weare Commission Company.

Q. That is the signature of whom?

A. That is the signature of Mr. Carmody.

31 Whereupon Mr. Sprogle introduced the said card in evidence; which said card is hereto attached, marked Exhibit A, and made a part thereof:

EX. A.

B. Al. V. Booth, grain and provision broker.

10 Weare Com. Co. CHICAGO, *Aug.* 16, 1899.

Sep. corn, 1899. C., 31½. Paid.

Good till close of 'change, Sat., Aug. 26, 1899.

WEARE C. CO.
J. J. C.

Cross-examination by Mr. MATHIAS:

Q. If I understand you correctly, Mr. Foster, this card represents an agreement whereby the Weare Commission Company offers to sell to Mr. Booth 10,000 bushels of corn, at 31½ cents a bushel, and agrees to give him ten days within which to accept the offer. Am I correct?

A. That is correct.

Whereupon Mr. Sprogle asked the following question:

Q. Isn't this what determines, Mr. Foster, that it gives to the Weare Commission Company an option to take within ten days 10,000 bushels of corn at 31½ cents a bushel?

A. No, sir. Allow me to state it as tersely as I may. For the consideration of $12.50 they give that privilege to the other man. He has the privilege to ask them to sell him that corn at 31½ cents a bushel at any time during the pendency of that option, or
32 at its close. He may take it or not. Hence the term privilege.

(By Mr. MATHIAS:)

Q. In a transaction of this kind the money is paid in consideration of the party leaving the offer to sell open for the given time?

A. Yes, sir.

Whereupon the witness was excused.

JOHN J. CARMODY, produced as a witness on behalf of the People, having been first duly sworn, testified as follows:

My name is John J. Carmody. I am a trader, a broker on the board of trade, and I am employed by the Weare Commission Company.

Whereupon the witness was asked the following question-:

Q. Do you know this card? What is it (indicating the card introduced in evidence during Mr. Foster's examination)?

A. Yes, sir. Well, it is ten calls sold to Mr. Al. V. Booth on September corn at 31½ cents, good until August 26th.

Q. Did you make that deal with Al. V. Booth?

A. Yes, sir.

Q. Was the money paid?

A. Yes, sir.

Q. And to whom?

A. It was paid to me by Mr. Booth at the board of trade in the city of Chicago, Cook county, Illinois. That card is known as a trading card.

Cross-examination by Mr. MATHIAS:

Q. As I understand your testimony, you agreed to sell Mr. Booth 10,000 bushels of corn at 31½ cents a bushel on August 16th, 1899, and he paid you $10, the consideration for your leaving the offer open for ten days; is that correct?

A. Yes, sir; that is correct.

33 Q. I mean by "you" the Weare Commission Company.

A. Yes, sir; that is right. The Weare Commission Company is a corporation.

Q. The grain was delivered upon this option, was it not?

A. 5,000 of it was delivered and 5,000 settled through the clearing-house.

Q. Did Mr. Booth elect to or did Mr. Booth avail himself of the option on the date of this contract or thereafter?

A. He did thereafter. The date I do not know. He called the grain.

(By Mr. SPROGLE:) Then you sold an option to Mr. Booth to buy 10,000 bushels of corn at 31½ cents, that option to be exercised within ten days from the date of this deal—the date of this card?

(The COURT:)

Q. By "you" you mean the Weare Commission Company?

A. Yes.

Q. He had the privilege of buying or not buying to be exercised within ten days?

—. Yes.

Q. And that was this deal?

A. Yes.

(Mr. SPROGLE:) That is all; we rest.

Whereupon the defendant, to maintain the issue upon his part, by his counsel, introduced the following evidence:

HOMER H. PETERS, produced as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. MATHIAS:

Q. State your name.

A. My name is Homer H. Peters; I reside in the city of Chicago. I am a grain merchant and a member of the firm of Bart-
34 lett, Frazier & Company, and have been a member of the board of trade for eleven years, and have been actively engaged in business on the board of trade during that time; I mean the Chicago board of trade. The business of our firm is principally that of shipping and exporting grain, and I am familiar with the practice upon the board of trade.

Whereupon Mr. Mathias asked the witness the following question-:

Q. Define a call.

A. A call is where one party, for a consideration, buys the privilege of calling a certain quantity or value of property within a specified period. It may be for twenty-four hours or it may be for a long time.

Q. In other words, a call may be said to be an agreement somewhat as follows: A offers to sell to B a thousand bushels of grain at 31 cents a bushel, and, in consideration of $10.00, paid by B to A, A agrees to leave the offer open for five days. Would that be a call?

A. Yes, sir.

(By the COURT:)

Q. The buyer pays the money for the privilege or option which is given to him?

A. Yes, sir.

Q. Has it been the practice on the board of trade for persons engaged in the shipping of grain to deal in puts and calls?

A. Yes, sir.

Q. You may give the reasons, Mr. Peters, why it is expedient for grain shippers to deal in puts and calls.

A. Well, in the course of our regular daily business we are offering large quantities of grain to European markets every night by cable. We send out our cables, for instance, tonight, that
35 those offers are good. For instance, taking Liverpool as the basis of time on the other side, that expires at three o'clock in Liverpool, England. That, we will say, is to be nine o'clock in Chicago—nine o'clock a. m. as against three o'clock p. m. there. The market opens here at nine thirty a. m. Our representatives in Europe file their cables or acceptance not later than three p. m.; those acceptances, then, would be in our hands prior to the opening of the market. Now, in cases of any unusual disturbance such as we frequently have in foreign countries or contingencies that are

liable to happen on this side, it is a very risky proposition to offer several hundred thousand bushels of grain without any possible insurance. We term it an insurance proposition.

(By the COURT:)

Q. Without any possible insurance as to what the price will be?

A. Well, sir, I would like to state, of course, that we must offer our grain in the usual course of business at about the current market price, with the expense of delivery. We offer our grain delivered to the foreign ports. We go into the market or have been accustomed to and buy what we have always termed in our legitimate business our insurance. In addition to paying the seller of the call a sum for the privilege of calling this grain within a certain period, we pay him, as a rule, a premium over the closing price for the risk that he takes, and that premium is governed largely by the opinions of the various traders as to what the risk may be over the existing contingencies. It may be an eighth of a cent a bushel or it may be a cent, or even more, and then these privileges or calls that
36 we are discussing being good to us in the instances that I am citing in our system for any time during the open market, the following day or the following business day when we have a market. Of course there may be a holiday intervening in between, or a Sunday. Then if our acceptances have been considerable or have been small and the action of the market is such that it is saving us money to take advantage of this privilege which we have bought, we take advantage of it; otherwise we are not compelled to do it. I would like to state that we regard it on the same basis as a man who insures his cargo on the lakes, as we do against a loss by wreckage or fire; if no loss occurs, you get no insurance; if it does occur, you are insured. Now, depriving us of the privilege of handling our business as we have handled it for years has removed all possibility of buying this insurance.

(By the COURT:)

Q. As I understand you, there are always great quantities of grain for sale at the market price here in Chicago?

A. Yes, sir.

Q. And there is always a demand in Liverpool for great quantities of grain at the market price there?

A. Yes.

Q. And you telegraph on to Liverpool, as you have to do in order to carry on business with a foreign port—you telegraph on there that you will sell a certain quantity of grain at, for instance, a dollar a bushel, based upon your being able to buy it, as you think, here at ninety cents, say?

A. Yes.

Q. Now, then, you don't know whether the people in Liverpool will accept your offer or not. Now, if they do accept your offer, then you are bound to deliver the grain?

A. Yes.

Q. And if your offer at a dollar has been based upon the
37 market price being ninety cents here when you made the offer, as you do not get a return back for some hours afterwards—that is, you do not receive knowledge as to whether your offer is accepted for some hours afterwards—in the meanwhile, between your cabling your offer and your getting back word of its acceptance, if grain should go up to ninety-five cents here you would make a great loss?

A. Yes.

Q. And therefore, to insure yourself against that, you pay a little something?

A. Yes, sir.

Q. For it to be delivered to you, say, at ninety cents or ninety and a fourth cents, maybe?

A. Yes.

Q. That is the reason you do it for that purpose?

A. Yes, sir.

Q. Purely as insurance?

A. Yes, sir.

Q. And you feel that you cannot do your business safely—that is, doing a large business and doing business the way it has to be done, selling in foreign markets—except you do have insurance; is that the idea?

A. Yes, sir.

By Mr. MATHIAS:

Q. How much grain does your firm ship each year?

A. Well, the shipping business fluctuates. We run during the last several years somewhere from thirty-five to forty-two million bushels.

Q. And the other large firms who are members of the board of trade do likewise, do they?

A. Yes, sir.

Q. Are any of those option contracts such as you have described ever settled on differences?

A. I don't know as I understand how you mean. Settled right on the board?

38 Q. Are they ever settled on differences—that is, if the market price of the grain has raised a cent or two or has lowered a cent or two—do you go to the person of whom you have bought the put or the call and say, "Now, there is about two cents difference in the market. You just pay me the difference and we will settle this option"?

A. No, sir.

Q. Did you ever know of such transaction being made upon the board of trade?

A. I never have known of one; no, sir.

Q. And your firm never makes any such?

A. Not to my knowledge.

(By the COURT:)

Q. I suppose in such cases as that, if the price of grain remained the same, you would simply not avail yourself of it. You would simply lose the money you had paid for the call?

A. If we did not avail ourselves of it; yes, sir.

Mr. MATHIAS:

Q. Suppose you do avail yourself of the privilege you have purchased, what is done?

A. The transaction is then made in just the same manner that it would have been made in the open board, in the pit.

Q. In other words, the grain is delivered?

A. The grain is delivered, the entry is sent to the proper department of the office, and settled through the clearing-house in the usual manner.

Q. What is the nature of the offers which you make to Liverpool and other foreign ports each night?

39 A. We simply offer firm, at a fixed price; that gives the Liverpool people nearly the entire period of their open market the following day.

Q. Well, as I understand it, it would be something like this: That it is the custom for commission men or grain dealers upon the board of trade in the evening to telegraph to a foreign port that they offer for sale, delivered at that port, a certain quantity of grain?

A. Yes.

Q. At a certain price?

A. Yes.

Q. And they give them until the next day at three o'clock, their time, or nine o'clock, Chicago time, to accept or refuse the offer. Is that the agreement?

A. Yes, sir. I may state, for instance, what an offer tonight would be, if it is proper.

Q. Very well; you may state.

A. The business with the U. K. or United Kingdom is done in quantities or loads. A load of corn is designated as four hundred eighty or eighty-six hundred bushels, so many loads. Chicago to corn at price, we will say, forty-seven C., I., F., Liverpool. C. I. F. is a term used in shipping, which means cost, insurance, and freight. That is the delivery price, late April or early May, from the seaboard, giving the seller the option of getting it the last half of April or the first half of May, because, of course, you have got to have the steamers and we have got to have time to get the grain forward from the West. Now, that offer is complete. There is nothing said in each particular cable about the time of acceptance. I would like to state, to make that clear, perhaps, that before any business transactions of any magnitude with people of foreign countries

40 we have what is called the London Corn Exchange contract. That is properly filled out to make all the special agreements, and that is subscribed to before business is finally opened, and that

provides for the answering of cables by the period I have named, so it is not necessary after that to embody that in your cable and pay the charges every day.

Q. One of the customs of the business, then, is that when you offer to sell delivered at Liverpool it is understood that the offer shall remain open until the following morning, at nine o'clock, Chicago time?

A. That is the idea; yes, sir.

Q. As I understand you, these telegrams that you say you send or these offers which you make are called firm offers?

A. Firm offers; yes, sir.

Q. And they are just the same as what we call calls, with the exception that no consideration is paid for the time to accept?

A. Practically so; it gives them the privilege of calling a certain quantity.

Q. But there is no consideration paid?

A. No consideration paid; no.

Q. Do you consider that freedom to use puts and calls in your business in the manner which you have testified is an advantage to you in your grain business?

A. It is a great necessity.

Mr. SPROGLE: I object to all this line of investigation because it does not pertain to the issue in this case, and I move that it be stricken out as immaterial and incompetent; which motion was sustained by the court; to which ruling of the court in sustaining said motion to strike out, the defendant, by his attorney, then and
41 there duly excepted.

WILLIAM S. CROSBY, produced as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. MATHIAS:

My name is William S. Crosby. I am in the grain business on the board of trade in Chicago, and have been a member of the board of trade since 1873. I am familiar with the operations of the clearing-house on the board of trade. The clearing-house of the board of trade is a piece of machinery the same as the clearing-house of the bank. For instance, the trade in wheat at the present time is and has been since probably last November largely for delivery in May. The volume of trade is very large. The buying and selling are constant.

Mr. SPROGLE: I want to interpose an objection here just to save the record.

The COURT: Well, let him go on.

The COURT: And let us hear what he is going to say.

A. And those transactions accumulate on the books of the commission men to a very large extent. Now, in order to avoid the risk and labor and expense of delivering, of keeping those trades open, say, until May and making delivery of them, they settle

them through the clearing-house in this way: If A has 5,000 bushels of wheat sold to B, and B has it sold back to A, they agree between them, if they please, to settle that through the clearing-house, and each pays into the clearing-house or collects from the clear-
42 ing-house according to the price at which he has the property bought or sold. Further than that, if A has wheat sold to B, and B has it sold to D, and D has it sold back to A, those three people, if they choose, agree to settle it through the clearing-house, and each pays into the clearing-house what he owes between the purchase price and selling price, or he collects from the clearing-house what he is entitled to between his selling price and buying price.

The COURT: In other words, the clearing-house of the board of trade has substantially the same method which is pursued by the banks in clearing their checks?

A. Yes, sir; precisely, and for the same reason. It is a labor-saving and risk-saving device.

By Mr. MATHIAS:

Q. With what firm are you connected?

A. F. G. Logan.

Q. What is their business?

A. Commission men.

Q. Do you know what a put and call are?

A. Yes, sir; I do.

Q. Did you hear the testimony of Mr. Peters upon that subject?

A. Yes, sir.

Q. Is his testimony correct?

A. Yes, sir. I think he confused it a little bit.

Q. Now you may state what you think a call is.

A. A call is an offer to sell property for some stated delivery, which, in consideration of a certain amount of money paid, is left open a certain length of time.

Q. What is a put?

A. A put is an offer to buy property, left open a certain length of time for the acceptance of the other party, in consideration of a stated amount of money paid.

43 Q. Do you know how puts and calls are mostly dealt in on the board?

A. How they are dealt in?

Q. Yes. By what persons are puts and calls mostly dealt in?

A. Well, it would be difficult to say how they are mostly dealt in. They are dealt in by all classes of people who have interest—by shippers and traders.

Q. Do you know what a firm offer is?

A. Yes, sir.

Q. You may explain that to the court.

A. A firm offer is an offer to sell property under certain terms for a certain delivery, left open for a certain length of time.

Q. Is that in uniform use on the board of trade?

A. Yes, sir. Most of the property that is shipped out of Chicago is shipped out on firm offers.

The COURT: Let me inquire of you whether you know if it is the practice of country buyers of grain generally throughout the country, as they buy from the farmers from day to day, the amount which they pay being governed by the Chicago market price, and it taking them a day or two to get the grain which they buy in here—if it is not their practice to protect themselves on the Chicago market against the fluctuation of grain by some such deal as you speak of.

A. Yes, sir; they often buy puts. Dealers at country stations buy puts to protect themselves. It is not a universal practice, but it is very often done. It is a common practice.

Mr. MATHIAS: What is the difference between a firm offer and a call?

A. A difference in the consideration paid. On a call a consideration is paid—a definite consideration—and in a firm offer it
44 is the prospective profit which is the consideration. That is all the difference there is.

Q. Why are puts and calls essential to *bona fide* commercial transactions upon the board of trade?

A. Well, in a general sense, they limit the risk, they reduce the risk, the same as insurance reduces the risk from fire and navigation.

Q. Are you familiar with all the transactions on the board of trade?

A. All kinds of transactions?

Q. Yes.

A. I think so; yes, sir.

Q. Did you ever know of a put or a call being settled on what is known as differences?

A. No, sir; not by ever doing it; never saw it done.

Q. That has always been against the rules of the board of trade, has it not?

A. Well, it is against the rules, but as a practice I never knew of a case where that was done.

Cross-examination by Mr. SPROGLE:

Q. Isn't it a fact, Mr. Crosby, that there is a great deal of speculative dealing in puts and calls?

A. Yes, sir; speculators both buy and sell them.

Q. If a man buy or sell an option and the market goes his way—that is, the course of the market is such as to show him a profit in his put or his call—doesn't he have to buy or sell against it in order to avail himself of his privilege?

A. Not necessarily. A shipper might buy a call—Mr. Peters might have a hundred thousand or five hundred thousand calls to-night, and tomorrow, — it was to his interest to call that property, *if it was to his interest to call that property*, he would call it,
45 and he would ship the property; maybe he would not sell it at all, you know.

Q. Well, how are these gambling trades in puts and calls settled; aren't they settled on differences?

A. Well, now, if you define gambling to be a trade in which there is no intention to deliver the property, I simply want to say to you there was never such a thing around the board of trade; never has been and is not now. That is where you people are all wrong and where the law is all wrong. There was never any such trade.

Q. That is your opinion?

A. I know it is so. There never was such a trade. There is no object in doing so; no incentive to do it, no possible incentive.

Whereupon Mr. Sprogle, representing the State, moved that the court strike out all the testimony of the witness as to the method of conducting the business on the board of trade and the utility of puts and calls; which motion the court sustained; to which ruling of the court in sustaining said motion defendant, by his counsel, then and there duly excepted.

Whereupon, both parties having rested, the defendant, by his attorney, requested and moved the court to hold and find each and all of the following propositions of law as the law of this case, as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof:

1. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another
46 the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 2, article 2, of the constitution of the State of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law," and is unconstitutional and void.

2. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides "nor shall any State deprive any person of life, liberty or property without due process of law," and is unconstitutional and void.

3. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides

that "no State shall deny to any person within its jurisdic-
47 tion the equal protection of the laws," and is unconstitutional and void.

4. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is unconstitutional and void.

5. That the facts proven herein do not constitute an offense contrary to the statute and against the peace and dignity of the People of the State of Illinois.

6. That the facts proven herein do not constitute an offense contrary to the statute of the State of Illinois.

7. That the facts proven herein do not constitute an offense against the peace and dignity of the People of the State of Illinois.

8. That the defendant is not guilty.

And the court, having heard the arguments of counsel, took the matter under advisement.

And be it further remembered that heretofore, to wit, upon the 26th day of March, A. D. 1900, the above cause coming on before Honorable Arba N. Waterman, one of the judges of the said court, and the court, having fully considered the arguments of counsel in the matter, refused to hold and find each and all of the following propositions of law as the law in this case as applying to the
48 first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof:

1. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 2, article 2, of the constitution of the State of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and is unconstitutional and void.

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3. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity,

stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contraven-
49 tion of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws," and is unconstitutional and void.

4. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is unconstitutional and void.

5. That the facts proven herein do not constitute an offense contrary to the statute and against the peace and dignity of the People of the State of Illinois.

6. That the facts proven herein do not constitute an offense contrary to the statute of the State of Illinois.

7. That the facts proven herein do not constitute an offense against the peace and dignity of the People of the State of Illinois.

8. That the defendant is not guilty.

as has been requested on behalf of the defendant, by his attorney; to which ruling of the court in refusing to hold and find each and all of the said propositions of law as the law in this case, as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, the defendant, by his attorney, then and there duly excepted.

50 Whereupon the said court found the defendant guilty as charged; to which said finding of the court the defendant, by his counsel, then and there duly excepted and moved the court for a new trial in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

STATE }
v. } 3221.
BOOTH. }

Comes now the defendant, by Lee D. Mathias, his attorney, and moves the court for a new trial herein, and as causes therefor says:

1st. The judgment of the court is contrary to the law.

2nd. The findings of the court are contrary to the law.

3rd. The court erred in sustaining the motion to strike out the testimony of Homer H. Peters or any part thereof.

4th. The court erred in striking out the testimony of William S. Crosby or any part thereof.

5th. The court erred in overruling defendant's motion to quash the indictment herein and each and every count thereof.

6th. The court erred in failing to hold each and all of the propositions of law as requested by the defendant as the law of this case.

For all of which errors the defendant prays for a new trial.

LEE D. MATHIAS,
Attorney for Defendant.

51 which motion the court then and there overruled; to which ruling of the court in so overruling the said motion for a new trial the defendant, by his counsel, then and there duly excepted.

And thereupon the defendant, by his counsel, moved the court in arrest of judgment in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Criminal Court of Cook County.

STATE OF ILLINOIS }
v. }
ALFRED V. BOOTH. }

Comes now the defendant, by Lee D. Mathias, his attorney, and moves the court to arrest the judgment herein for the following reasons, to wit:

1. That the court has no jurisdiction herein.

2. That the alleged statute upon which the indictment herein is based is in contravention of section 2, article 2, of the constitution of the State of Illinois and is unconstitutional and void.

3. That the alleged statute upon which the indictment herein is based is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides "nor shall any State deprive any
52 person of life, liberty, or property without due process of law," and is unconstitutional and void.

4. That the alleged statute upon which the indictment herein is based is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws," and is unconstitutional and void.

5. That the indictment herein charges no offense contrary to the statutes of the State of Illinois.

6. That the indictment herein charges no offense against the peace and dignity of the People of the State of Illinois.

7. That the indictment herein charges no offense contrary to the statute and against the peace and dignity of the People of the State of Illinois.

LEE D. MATHIAS,
Attorney for Defendant.

Which motion the court then and there overruled; to which ruling of the court in so overruling the said motion in arrest of judgment the defendant, by his counsel, then and there duly excepted.

Whereupon the court entered judgment on his findings herein and adjudged that the defendant be fined in the sum of one hundred dollars and pay all the costs in these proceedings; to which order and judgment the defendant, by his counsel, then and there duly excepted.

And forasmuch as the matters above set forth do not fully
53 appear of record the defendant tenders this his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made, which is done accordingly this 31st day of March, A. D. 1900.

A. N. WATERMAN, [SEAL.]
Judge of the Criminal Court of Cook County.

O K.
NATH. E. TAYLOR,
Sp'l Counsel for People.

O K.
LEE D. *MARTIN.*

O K.
CHARLES S. DENEEN,
State's Attorney.
HOWARD O. SPROGLE,
Ass't State's Attorney.

54 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Patrick J. Cahill, clerk of the criminal court of Cook county, in said county and State, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record in a certain cause lately pending in said court, wherein The People of the State of Illinois were plaintiffs and Alfred V. Booth defendant.

Witness Patrick J. Cahill, clerk of said court, and the
[SEAL.] seal thereof, at Chicago, in said county, this 31st day of March, A. D. 1900.

PATRICK J. CAHILL, *Clerk.*

55 In the Supreme Court of Illinois.

ALFRED V. BOOTH, Plaintiff in Error,
v.
PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.

Assignment of Errors.

Comes now the plaintiff in error, by Lee D. Mathias, his attorney, and says that manifest error intervenes in the record herein in this, to wit:

1. The court below erred in overruling the motion to quash the indictment herein and each and every count thereof.

2. The court below erred in striking out the testimony of Homer H. Peters herein.

3. The court below erred in striking out the testimony of William S. Crosby herein as to the method of conducting business on the board of trade and the utility of puts and calls.

4. The court below erred in refusing to hold each and all of the following propositions of law as the law in this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the plaintiff in error, defendant below:

1. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in
56 the county jail not exceeding one year, or both," is in contravention of section 2, article 2, of the constitution of the State of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law," and is unconstitutional and void.

2. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is *is* in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides "nor shall any State deprive any person of life, liberty or property without due process of law," and is unconstitutional and void.

3. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws," and is unconstitutional and void.

57 4. That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is unconstitutional and void.

5. That the facts proven herein do not constitute an offense con-

trary to the statute and against the peace and dignity of the People of the State of Illinois.

6. That the facts proven herein do not constitute an offense contrary to the statute of the State of Illinois.

7. That the facts proven herein do not constitute an offense against the peace and dignity of the People of the State of Illinois.

8. That the defendant is not guilty.

5. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant:

That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the
58 county jail not exceeding one year, or both," is in contravention of section 2, article 2, of the constitution of the State of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process or law," and is un-stitutional and void.

6. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant:

That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides "nor shall any State deprive any person of life, liberty or property without due process of law," and is unconstitutional and void.

7. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant:

That section 130 of the Criminal Code, in so far as it provides that
"whoever contracts to have or give to himself or another the
59 option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides

that "no State shall deny to any person within its jurisdiction the equal protection of the laws," and is un-stitutional and void.

8. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant:

That section 130 of the Criminal Code, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail nor exceeding one year, or both," is unconstitutional and void.

9. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant:

That the facts proven herein do not constitute an offense contrary to the statute and against the peace and dignity of the People of the State of Illinois.

10. The court below erred in refusing to find and hold the
60 following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant.

That the facts proven herein do not constitute an offense contrary to the statute of the State of Illinois.

11. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant:

That the facts proven herein do not constitute an offense against the peace and dignity of the People of the State of Illinois.

12. The court below erred in refusing to find and hold the following proposition of law as the law of this case as applying to the first, second, third, fourth, fifth, sixth, and seventh counts of the indictment herein and each and every thereof, as requested by the defendant: .

That the defendant is not guilty.

13. The court erred in overruling the motion of the defendant for a new trial herein.

14. The court below erred in overruling the motion of the defendant in arrest of judgment herein.

15. The court below erred in finding the defendant guilty as charged.

16. The court below erred in finding the defendant guilty as charged and assessing a fine of one hundred dollars and costs against him.

17. The court below erred in adjudging that the defendant
61 pay a fine of one hundred dollars and the costs herein.

Wherefore the plaintiff in error prays that the decision of the court below in this case be in all things reversed.

LEE D. MATHIAS,
Attorney for Plaintiff in Error.

62 And afterwards, to wit, on the thirteenth day of April, A. D. 1900, certain proceedings were had in said court and orders entered of record in the words and figures following, viz:

ALFRED V. BOOTH
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1341. Error to Criminal Court, Cook.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee, —— ——, having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken —, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

63 And afterwards, to wit, on the fourteenth day of April, A. D. 1900, certain proceedings were had in said court and orders entered of record in the words and figures following, viz:

ALFRED V. BOOTH
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 1341. Error to Criminal Court, Cook.

And now, on this day, on motion of the attorney general, it is ordered by the court that the time to file briefs herein be, and the same is hereby, extended five days.

64 At a supreme court begun and held at Springfield on Tuesday, the fifth day of June, in the year of our Lord one thousand nine hundred, within and for the State of Illinois.

Present: Carroll C. Boggs, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; James H. Cartwright, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk*.

Be it remembered, to wit, on the twenty-first day of June, A. D. 1900, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

ALFRED V. BOOTH
v.
THE PEOPLE OF THE STATE OF ILLINOIS. } No. 1341. Appeal from Criminal Court, Cook.

And now, on this day, this cause having been argued by counsel and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error: Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellees recover of and from the said appellant their costs by them in this behalf expended, and that they have execution therefor.

65 And upon the entering of said order there was filed in the office of the clerk of said court the opinion of the court in the words and figures following:

ALFRED V. BOOTH
vs.
THE PEOPLE OF THE STATE OF ILLINOIS. } 1341. Appeal from Criminal Court, Cook.

Mr. Chief Justice Boggs delivered the opinion of the court:

The plaintiff in error was convicted and adjudged to pay a fine of $100 under an indictment which charged that he, on the 16th day of August, 1899, in said county of Cook, in the State of Illinois aforesaid, unlawfully did contract in writing with the Weare Commission Company, a corporation, to then and there have to himself, to wit, to said Alfred V. Booth, a certain option to buy at a future time, to wit, on or before the 26th day of August, in the year of our Lord one thousand eight hundred and ninety-nine, a certain commodity, to wit, grain, to wit, 10,000 bushels of corn, from the said Weare Commission Company, a corporation, as aforesaid; which said contract is in the words and figures as follows, to wit:

"Alfred V. Booth, grain and provision broker.

10 Weare Com. Co. CHICAGO, *Aug.* 16, 1899.

Sep. corn, 1899. C., 31½. Paid.

Good till close of 'change, Sat., Aug. 26, 1899.

WEARE C. CO.
J. J. C."

66 contrary to the statute and against the peace and dignity of the same People of the State of Illinois. The evidence explained the writing set out in the indictment to constitute an agreement giving defendant the option to buy 10,000 bushels of corn at thirty-one and one-half cents per bushel from the Weare Commission Company at any time within ten days after the 16th day of August, 1899. The allegations of fact set forth in the indictment were fully established by the evidence.

Counsel for plaintiff in error contends it did not appear from the proof the plaintiff in error entered into the contract, with any other than the *bona fide* intention to accept the corn if he desired to avail himself of the benefit of the contract, or that he had any intent, when the contract was executed, to accept compliance with the contract merely by way of the payment to him of the difference between the contract price and the market price of the corn at the time of the maturity of the contract, and further contends it appears from the evidence that the contract was in fact consummated by the actual delivery of the grain to him. Counsel for defendant in error do not question the position thus taken by counsel for plaintiff in error as to the facts proven on the hearing. Counsel for plaintiff in error admits the facts so charged in the indictment and established by the evidence in support thereof justified the conviction under the provisions of section 130 of the Criminal Code, as interpreted by this court in Schneider *v.* Turner, 130 Ill., 28, but insists, first, said section 130 is in contravention of the provision incorporated in the Constitution of the United States, and also in the constitution of the State of Illinois, that "no person shall be deprived of life, liberty or property without due process of law," and, second, that
67 said section is violative of the provision of section 1 of the fourteenth amendment of the Constitution of the United States which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." We will consider these points in order as made by counsel.

First. Liberty and property, as used in said constitutional provisions, include the right to acquire property, and that means and includes the privilege of contracting and making and enforcing contracts. (Frorer *v.* People, 141 Ill., 171.) A citizen cannot be deprived of an attribute of property, like the right to make a reasonable contract with reference to property, without "due process of law." Due process of law is a general public law of the land. (Millett *v.* People, 117 Ill., 294; Ritchie *v.* People, 155 *id.*, 98.) The General Assembly of the State of Illinois possesses full plenary power of legislation, except in so far as its powers are limited by the State or Federal Constitution. The State inherently possesses and the General Assembly may lawfully exercise such power of restraint upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety, and welfare of society. This power is known as the police power of the State. In the exercise of this power the General Assembly may, by valid enactments—*i. e.*, "due process of law"—prohibit all things hurtful to the comfort, safety, and welfare of society, even though the prohibition invade

the right of liberty or property of an individual. (18 Am. & Eng. Ency. of Law, 739, 740; Town of Lake View *v.* Rose Hill Cemetery Co., 70 Ill., 191.) An enactment to have that effect and be valid must be an appropriate measure for the promotion of the comfort, safety, and welfare of society. It must be, in fact, a police
68 regulation. Courts are authorized to interfere and declare a statute unconstitutional or not the "law of the land" if it conflicts with the constitutional rights of the individual and does not relate to or is not an appropriate measure for the promotion of the comfort, safety, and welfare of society. (Ritchie *v.* People, *supra.*) With the wisdom, policy, or necessity for such an enactment courts have nothing to do. But what are the subjects of police powers and what are reasonable regulations are judicial questions, and the courts may declare enactments which, under the guise of the police power, go beyond the great principle of securing the safety or welfare of the public, to be invalid.

Laws for the suppression of all forms of gambling have, without exception, so far as we are advised, been regarded by the courts and law-writers as a proper exercise of the police power. This is conceded by counsel for plaintiff in error, but his contention is the contract for entering into which the plaintiff in error was convicted is neither illegal nor within itself immoral—is neither void nor voidable under principles of the common law; that this court so declared in Schneider *v.* Turner, *supra*, and that it is not within the power of the State, in virtue of the police power, to deprive a citizen of the right guaranteed by the constitutions of the United States and of the State of Illinois, to enter into a contract which is not within itself harmful, immoral, or injurious to the health, morals, or safety of the public. The proposition is, a contract which within itself is not harmful, immoral, or illegal and which constitutes a right of property or liberty, within the meaning of those words as employed in the organic law of the Federal and State governments, cannot be denounced as illegal in the exercise of the police power of
69 the State. This would be to place a limitation upon the police power which might greatly imprair its usefulness and often render its proper exercise entirely futile. It would restrict its operation to declaring that illegal which was already illegal. As we have hereinbefore said, it is not without the power of the General Assembly, in the proper exercise of the police power, by an enactment otherwise valid, to declare that unlawful which was theretofore lawful, even if the act so condemned be an attribute of the right of liberty or property guaranteed to the citizen by the constitutional provisions under consideration. The language of the constitutional provision is so chosen as to recognize the right of the State to deprive a citizen of life, liberty, or property by "due process of law." Due process of law is synon-mous with "law of the land;" hence the law of the land may expressly prohibit and make criminal the doing of an act which, in the absence of such law of the land, would constitute a liberty or property right within the meaning of the Constitution, even though such act be not within itself immoral.

In Magner *v.* People, 97 Ill., 320, it was urged that certain provisions of the then existing game laws of the State which declared it unlawful for any one to have in his possession wild fowl or birds of the kind designed to be protected by the statute which had been lawfully taken or killed in another State were in contravention of clause 8 of article 1 of the Constitution of the United States, which confers upon Congress the power to regulate commerce among the several States. It was there held that the object of the statute was the protection of the game therein mentioned, and that the prohibition of "all possession and sales" of such game would tend
70 to their protection and thereby advance the ends to be secured by the legislation, and the conviction of the plaintiff in error, Magner, of the offense of having quail in his possession which had been killed in the State of Kansas and sold by the said Magner in this State was upheld, and it was there said (p. 331): "This is but one among many instances to be found in the law where acts which in and of themselves alone are harmless enough are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful."

The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil, and that the suppression of such evil is within the proper exercise of the police power has been too frequently declared to be open to discussion. The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is *bona fide* contemplated and intended by the parties, but in contracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article. The object to be accomplished by the legislation under consideration is the suppression of contracts of the latter character, which are in truth mere wagers as to the future market price of the article or commodity which is the subject-matter of the wager. Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn but does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of
71 vendor and vendee. Such contracts are in the nature of wagers, that contracted for being the mere privilege to buy the grain should its market value prove to be greater than the price fixed in the contract for such privilege. The prohibition of the right to enter into contracts which do not contemplate the creation of an obligation on the part of one of the contracting parties to accept and pay for the commodity which is the purported subject-matter of the contract, but only to invest him with the option or privilege to demand, the other contracting party shall deliver him the grain if he desires to purchase it, tends materially to the suppression of the very evil of gambling in grain options which it was the legislative intent to extirpate, for the reason such evil injuriously affected the

welfare and safety of the public. The denial of the right to make such contracts tended directly to advance the end the legislature had in view and was not an inappropriate measure of attack on the evil intended to be eradicated. So far as that point is concerned, the act must be deemed a valid law of the land, and as such must be enforced, though it infringe in a degree upon the property rights of citizens. To that extent private right must be deemed secondary to the public good.

Second. Nor do we think the enactment in question denies to any person the equal protection of the law. Its penalties are directed against all persons and classes of persons who offend against its provisions. It is true it does not prohibit contracts for options to buy or sell, or the purchase or sale on future delivery of all kinds and classes of property, nor was it necessary to the validity of the act it should reach and prohibit all contracts of that character. The remedy need only be as comprehensive as the evil
72 the law designed to remove. In considering as to the propriety of adopting the enactment and as to the necessary scope of the proposed legislation, it is fair to assume it was present in the legislative mind that the proposed prohibition of the right to contract was an infringement upon the rights of property and liberty of the individual, and that it was the legislative design to trench only in the slightest possible degree upon private and individual right, and for that reason the act was so framed as to restrict the operation thereof to transactions in such kinds and character of property, commodities, and securities as had been made the subject of gambling or wagering contracts, and out of which grew the evil which threatened the welfare and safety of the public, and to place no restraints upon contracts which, though of like character of those which were prohibited, had not been employed as a means of gambling. Counsel insist contracts to have or give options to buy or sell other articles, commodities, or securities than those specified may be lawfully made, but do not suggest that the practice had grown up of contracting to have or give options to be settled merely by way of "differences" in any articles or commodities other than those comprehended within the statute. It is not indispensable, in order to be constitutional, the section should embrace all kinds of personal property, whether such kinds of personal property had usually or commonly been the subject of option dealing or not. It is sufficient if the selection of the articles and property mentioned in the section is based on reasonable and just grounds of difference, and the prohibition comprehends all kinds of property within the relations and circumstances which constitute the distinction, and extends equally to every citizen and all classes of citizens, and denies to *do* one a privilege which another is permitted
73 under like circumstances to exercise or employ. The prohibition need not embrace all contracts for options to buy or sell, but only all of such contracts as lie at the root of the evil which threatens the public safety and welfare.

We think the enactment the valid law of the land. The judgment is affirmed.

Judgment affirmed.

74 And afterwards, to wit, on the 22nd day of October, A. D. 1900, there was filed in the office of the clerk of said court a certain petition for writ of error; which said petition and endorsement is in the words and figures following:

75 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

ALFRED V. BOOTH, Plaintiff in Error,
vs.
PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error. } Petition for Writ of Error.

Comes now Alfred V. Booth, plaintiff in error, and says that on or about the twenty-first day of June, A. D. 1900, the supreme court of Illinois entered an order sustaining the judgment of the criminal court of Cook county, Illinois, in this cause; in which order and the proceedings had thereunder certain errors were committed to the prejudice of the plaintiff in error; all of which will in detail appear from the assignment of errors which is filed with this petition.

Wherefore this petitioner prays that a writ of error may issue from this court in his behalf to the supreme court of Illinois for the correction of errors so complained of, and that a transcript of record, proceedings, and papers in this cause there remaining may be sent to this court.

LEE D. MATHIAS,
Attorney for Plaintiff in Error.

Allowed.
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.
October 17, 1900.

76 And afterwards, to wit, on the 22nd day of October, A. D. 1900, there was filed in the office of the clerk of said court a certain bond; which said bond is in the words and figures following:

77 (Copy.)

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

ALFRED V. BOOTH, Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error. } Bond.

Know all men by these presents that we, Alfred V. Booth, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the People of the State of Illinois, defendant in error, above named, in the sum of

five hundred dollars, to be paid to the said People of the State of Illinois; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated the fourteenth day of September, A. D. 1900.

Whereas the above-named plaintiff in error, Alfred V. Booth, has sued out a writ of error from the Supreme Court of the United States to reverse the judgment in the above-entitled cause by the supreme court of the State of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Alfred V. Booth shall prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

A. V. BOOTH. [SEAL.]
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By B. H. COULSLING, *Attorney-in-fact.*

Approved by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

78 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

ALFRED V. BOOTH, Plaintiff in Error,
vs.
PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.
} Assignment of Errors.

The plaintiff in error in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred in the supreme court of Illinois upon the hearing of this cause, to wit:

First. The court erred in refusing to hold that section 130 of the Criminal Code of Illinois, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides, "nor shall any State deprive any person of life, liberty, or property without due process of law," and is unconstitutional and void.

Second. The court erred in refusing to hold that section 130 of the Criminal Code of Illinois, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or

buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county
79 jail not exceeding one year, or both," is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws," and is unconstitutional and void.

Third. The court erred in refusing to hold that section 130 of the Criminal Code of Illinois, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both," is unconstitutional and void.

Wherefore the plaintiff in error prays that the decree and order of said court affirming the judgment of the criminal court of Cook county, Illinois, be in all things reversed and set aside.

LEE D. MATHIAS,
Attorney for Plaintiff in Error.

Endorsed on cover: File No., 17,979. Illinois supreme court. Term No., 494. Alfred V. Booth, plaintiff in error, *vs.* The People of the State of Illinois. Filed November 26, 1900.

No. [illegible] 201.

Motion to advance.

Filed Feb. 16, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

ALFRED V. BOOTH,

Plaintiff in Error,

vs.

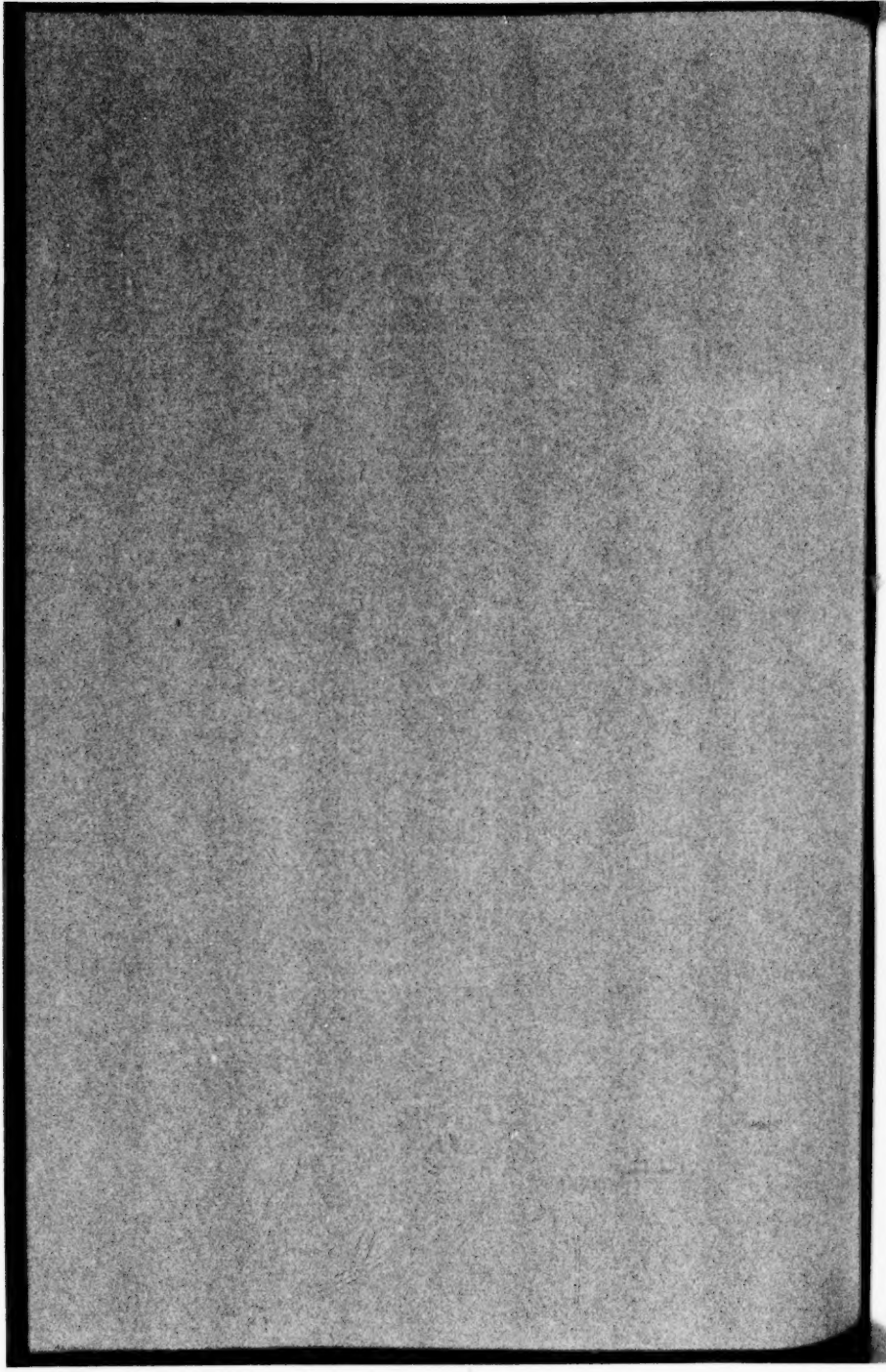
THE PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error.

MOTION TO ADVANCE.

L. D. MATHIAS,
Attorney for Plaintiff in Error.

[illegible] BROS., LAW PRINTERS, [illegible] DEARBORN ST., CHICAGO



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

ALFRED V. BOOTH,

Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error.

MOTION TO ADVANCE.

This case is bought up on writ of error to revise the judgment of the Supreme Court of the State of Illinois sustaining the conviction of the plaintiff in error by the Criminal Court of Cook County, Illinois, for contracting "to have to himself the option to buy at a future time a certain commodity, to wit, grain, to wit, ten thousand bushels of corn, contrary to the statute and against the peace and dignity of the same People of the State of Illinois." (R. 6.)

On the trial of the case the plaintiff in error was convicted and adjudged to pay a fine of one hundred dollars and the cost of the proceedings.

From this judgment of conviction a writ of error was prosecuted to the Supreme Court of the state, the plaintiff

in error assigning for errors in that court, among others, the following (R. 30):

> "That section 130 of the Criminal Code, in so far as it provides that 'whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides 'nor shall any State deprive any person of life, liberty or property without due process of law,' and is unconstitutional and void.
>
> "That section 130 of the Criminal Code, in so far as it provides that 'whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold . . . shall be fined not less than $10, nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which provides that 'no State shall deny to any person within its jurisdiction the equal protection of the laws,' and is unconstitutional and void.
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> "That section 130 of the Criminal Code, in so far as it provides that 'whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold . . . shall be fined not less than $10, nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is unconstitutional and void."

The Supreme Court of Illinois held that the State law referred to was constitutional and affirmed the conviction by the court below. (R. 35-38.)

A writ of error was allowed by this court and the same

reasons for the reversal of the judgment as are above quoted are again assigned here. (R. 40-41.)

The plaintiff in error asks that the cause be advanced and set down for early hearing pursuant to section 710, Revised Statutes of the United States.

Respectfully submitted,

L. D. MATHIAS,

Attorney for Plaintiff in Error.

No. 201.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 201.

ALFRED V. BOOTH, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

CHARLES S. ALDRICH,
LEE S. MATHER,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 494.

ALFRED V. BOOTH, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Facts.

This is a criminal action wherein the plaintiff in error was indicted by the grand jury of Cook County, Illinois, the indictment substantially charging that on the 16th day of August, 1899, the plaintiff in error unlawfully did contract to have to himself an option to buy at a future time a certain commodity, to wit, grain, contrary to Section 130 of the Criminal Code of the State of Illinois, which provides as follows:

> "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall

be fined not less than $10, nor more than $1,000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void." (Record, p. 6.)

The plaintiff in error waived a jury in writing and the cause was tried by the court without the intervention of a jury.

The evidence (Record, p. 15 *et seq.*) shows that on the 16th day of August, 1899, the plaintiff in error entered into an agreement on the Board of Trade at Chicago, Illinois, with the Weare Commission Company, a corporation, whereby he was to have an option to purchase from the Weare Commission Company within ten days from that date 10,000 bushels of corn at thirty-one and one-half cents per bushel, for which option the plaintiff in error paid to the Weare Commission Company the sum of $10; that within the ten days the plaintiff in error availed himself of his right to purchase the corn in accordance with the foregoing agreement and did so purchase it. Five thousand bushels of the corn was delivered to him by the Weare Commission Company and the remaining 5,000 bushels settled through the clearing house of the Chicago Board of Trade. The plaintiff in error contended that he was guilty of no offense against the peace and dignity of the people of the State of Illinois, for the reason that the statute pursuant to which he was indicted, in so far as it attempts to invalidate a *bona fide* moral option contract wherein the parties to the contract intend in the event the option is exercised to deliver the goods and not to settle on the differences in the market value, is unconstitutional and void, as being in derogation of Section 1 of the 14th Amendment of the Constitution of the United States.

This question was raised by a motion to quash the in-

dictment (Record, p. 13), by a request to the court to hold certain propositions of law as the law of this case (Record, p. 25), by a motion for a new trial (Record, p. 27), by a motion in arrest of judgment (Record, p. 28), all of which motions and request were denied by the Criminal Court of Cook County, to which rulings of the court the plaintiff in error duly excepted.

The plaintiff in error was found guilty, as charged in the indictment, and fined $100 and costs, from which judgment a writ of error was sued out of the office of the Clerk of the Supreme Court of the State of Illinois. In that court the plaintiff in error assigned errors, raising the point that the statute, pursuant to which the plaintiff in error had been convicted, was in violation of the 14th Amendment of the Constitution of the United States. The Supreme Court of Illinois affirmed the judgment below and in its opinion passed upon the constitutionality of the act as found on pages 34 to 38, inclusive, of the Record.

The case is brought into this court by writ of error.

Errors Relied Upon.

In this court the plaintiff in error has assigned the following errors:

> "*First.* The court erred in refusing to hold that section 130 of the Criminal Code of Illinois, in so far as it provides that 'whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which

provides, 'nor shall any State deprive any person of life, liberty, or property without due process of law,' and is unconstitutional and void.

"*Second.* The court erred in refusing to hold that section 130 of the Criminal Code of Illinois in so far as it provides that 'whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is unconstitutional and void."

BRIEF.

Section 130 of the Criminal Code of the State of Illinois, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold . . . shall be fined not less than $10 nor more than $1000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void," is in contravention of the Constitution of the United States of America which provides that "no person shall be deprived of life, liberty or property without due process of law."

The statute in full is as follows:

> "Gambling in grain, etc., § 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

The word "options" at the time the law was enacted (1874) was a trade word and had the significance of a contract of purchase and sale of grain or other commodity for future delivery in which the parties did not in-

tend to deliver the thing bought or sold, but intended to settle the transaction by the payment from one to the other of the difference between the contract price and the price at the date of delivery in accordance with the rise or fall of the market.

Shaw v. *Clark et al.*, 49 Mich., 384; opinion by Justice Cooley.

Am. & Eng. Encyc. of Law, vol. 8, 1011.

Wolcott v. *Heath*, 78 Ill., 433.

Tenney v. *Foote*, 95 Ill., 99.

Pearce v. *Foote*, 113 Ill., 228.

Cothran v. *Ellis*, 125 Ill., 496.

The Supreme Court of Illinois practically overruled this interpretation of the act in the case of *Schneider* v. *Turner*, 130 Ill., 28, and held that the legislature did not intend by the act to make the most prevailing form of gambling in commodities a crime, but only intended that the law should prohibit option contracts, strictly speaking, whether the same were moral or immoral.

Schneider v. *Turner*, 130 Ill., 28.

Schlee v. *Guckenheimer*, 179 Ill., 593.

This decision has since been followed.

In *Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390, a contract to purchase 12,000 tons of coal at prices named with the option to purchase additional quantities at an advance of fifty cents per ton during the season was held to be void as to the option part of the contract.

In *Kerting* v. *Hilton*, 51 Ill. App. Ct. Rep., 437, an agreement providing for the employment of a party in the manufacturing business and giving him an option to buy the plant on or before a day named was held to be void under the statute as to the option clause of the contract.

Ubben v. *Binnian*, 78 Ill. App. Ct. Rep., 330.

McKeon Receiver et al. v. *Wolf*, 77 Ill. App. Ct. Rep., 325.
Wolsey et al. v. *Neeley*, 62 Ill. App. Ct. Rep., 141.
Peterson v. *Currier*, 62 Ill. App. Ct. Rep., 163.
Schlee v. *Guckenheimer*, 179 Ill., 593.

In these cases there was no element of immorality. They are cited for the purpose of defining the meaning of the act.

The statute upon the constitutionality of which the court is to pass is not one which makes it criminal to buy or sell commodities without any intention of delivering or receiving the commodity, and with the intention of settling in differences, but is on the other hand a statute which makes it criminal to enter into an option contract, whether the same is moral or immoral.

Bona fide speculation is not gambling.

Kirkpatrick v. *Bonsall*, 72 Pa. St., 115, 159.

The Chicago Board of Trade is most important to the producing community to carry the surplus production from the time of harvest until consumed. Option contracts are important for this purpose.

Option contracts are not immoral nor were they illegal at common law.

Schneider v. *Turner*, 130 Ill., 28.
Schlee v. *Guckenheimer*, 179 Ill., 593.

Courts of equity compel the specific performance of option contracts.

Watts v. *Kellar*, 12 U. S. App., 274.

By the insertion of a few words the statute would have been made beneficial to the whole community. How easy it would have been to have said "Whoever contracts to have or give to himself or another the option to sell or buy at a

future time any grain or other commodity, stock of any railroad or other company, or gold" *with the intention of not delivering the property and settling in differences, etc.*

Section 6934a of Bates Annotated Statutes of Ohio, 2nd edition, is identical with the Illinois law except for a provision confining the operation of the statute to actual gambling transactions The Supreme Court of Ohio, in the case of *Lester* v. *Buell,* 49 Ohio St., 240, decided that the statute applied to contracts for the purchase and sale of commodities in which the parties did not intend to deliver or receive the commodity, but to settle on differences, giving to the word option the significance that has often been attached to it of a gambling transaction. The other states that have legislated on the subject have made the same distinction.

Vermont Statutes, 1894, Secs. 5128-30.
Rev. Statutes of Missouri, 1889, Sec. 3831-2.
Constitution of Louisiana, 1898, Art. 189.
Compiled Laws of Michigan, 1887, Sec. 11373-5.
Code of Iowa, 1897, Sec. 4967-8.
Sanborn & Berriman's Ann. Statutes of Wisconsin, 1890, Sec. 2319a.
Code of Tennessee, 1896, Secs. 3166-7-8.
Ann. Code of Mississippi, 1892, Sec. 2117.

This is a natural distinction. There is no difficulty in defining or proving what is and what is not a contract to gamble in grain or other commodities. The intention not to deliver or receive the commodity bought or sold and to settle in differences are the elements that make contracts to buy and sell grain immoral.

The act in so far as it prohibits the making of bona fide moral option contracts deprives the citizen of liberty and property without due process of law. The liberty to con-

tract is protected by the 14th Amendment of the Constitution of the United States.

Holden v. *Hardy*, 169 U. S., 366.
Allgeyer v. *Louisiana*, 165 U. S., 578, 589.
State v. *Goodwill*, 33 W. Va., 179
Braceville Coal Co. v. *People*, 147 Ill., 66.
Munn v. *Illinois*, 94 U. S., 113.
Commissioners v. *Perry*, 155 Mass., 117.
In re Rice, 79 F. R., 627.
State v. *Five Creek Coal & Coke Co.*, 33 W. Va., 188.

The Supreme Court of Arkansas in the case of *Fortenbury* v. *State*, 47 Ark., 188, held by implication that if a statute prohibiting dealing in "futures" must be construed to apply to all contracts for future delivery which a broad interpretation of the statute might justify, then it would be unconstitutional. See, also, *State* v. *Gretzner*, 134 Mo., 512.

The act cannot be justified under the doctrine of police power.

Toledo, etc., Railway Company v. *Jacksonville*, 67 Ill., 37.
Welkinsin v. *Leland*, 2 Peters, 627.
Village of Desplaines v. *Poyer*, 123 Ill., 348.
Mugler v. *Kansas*, 123 U. S., 623, 661.
State v. *Noyes*, 46 Me., 189.

Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting.

Hartford Insurance Co. v. *Chicago, Milwaukee & St. Paul Railway Co.*, 175 U. S., 91, 106.
Printing Co. v. *Sampson*, L. R. 19 Eq., 162, 465.

There is a sharp dividing line between gambling con-

tracts and moral, legal option agreements. There is no overlapping. It is a question of intention. If the parties intend that the commodity bought or sold shall be delivered or received and paid for there is no gambling. If they intend not to deliver or receive the property bought or sold, but to settle on differences, there is gambling. To prohibit the latter it is unreasonable and unnecessary to prohibit the former. The reasonableness or unreasonableness of a state enactment is always to be considered in determining whether the legislation comes within the police power, and it is submitted that the statute as construed comes within the principles announced in *Stone et al.* v. *Farmers Loan & Trust Co.*, 116 U. S., 307, 331; *Mugler* v. *Kansas*, 123 U. S., 623, 661, 663, 664; *Chicago, etc., Railroad Co.* v. *Minnesota*, 134 U. S., 412; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Chicago, etc., Railroad Co.* v. *Wellman*, 143 U. S., 339; *Lawton* v. *Steele*, 152 U. S., 133, 136; *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S., 362; *Covington & Temple Co.* v. *Sandford*, 164 U. S., 578; *Holden* v. *Hardy*, 169 U. S., 366, 392; *Smyth* v. *Ames*, 169 U. S., 466; *Lake Shore & Michigan Southern Railway Co.* v. *Ohio*, 173 U. S., 285, 301; *Lake Shore, etc., Railway Co.* v. *Smith*, 173 U. S., 684.

ARGUMENT.

This statute is aimed at the suppression of gambling in grain or other commodities.

We admit that the state has the right under its police power to prohibit gambling in any form and to make the offense of gambling a crime.

We deny that the state has the power to forbid any person of competent understanding to enter into a legal, moral option contract.

The Supreme Court of Illinois has decided that the statute should be construed so as to forbid not only immoral "option" contracts, but also all *bona fide* moral option agreements.

This court is bound by the construction of the Supreme Court of Illinois as to the meaning of the act (*Erie R. R. Co.* v. *Pennsylvania,* 158 U. S., 431; *Forsythe* v. *Hammond,* 166 U. S., 506, 519, and cases cited), although not as to its constitutionality. In order, therefore, to define more clearly its meaning, attention will be called to the divers meanings of the word "option," when applied to operations upon the Board of Trade and Stock Exchanges, and to the judicial history of the act in question.

The Am. Enc. of Law, Vol. 8, 1011, says:

> "Some of the courts have used the word 'option' very laxly. In many instances it has been applied to any contract which the parties intended to settle by way of differences. This extended use of the word has lead to what may seem to be a conflict in decisions,—thus it has been laid down that optional contracts are void as against public policy, and the unwary might infer that this applied to options strictly so called. An examination of the cases, however, reveals the fact that the language is applied to contracts under which the intention of the parties was

to speculate in differences and which therefore were invalid no matter what their form was."

The encyclopedia cites many cases under the above quotation, but none of them are cases of pure option contracts and an examination of the citations shows that the author of the article fell into the unfortunate situation against which he had warned the unwary.

Shaw v. *Clark et al.*, 49 Mich., 384, was a suit on a note of $4,000 in the hands of an innocent purchaser for value. The defense was that the consideration of the note was illegal and void as arising from certain gambling dealings in "options." Judgment for the plaintiff.

Justice Cooley, in delivering the opinion of the court, said:

> "In common speech gaming is applied to play with stakes at cards, dice, or other contrivance to see which shall be the winner and which the losers. A contract for the purchase of options is not gaming within this meaning of the term. *In form it is the purchase and sale of the commodity to be delivered at a future day and it only resembles gaming in that the parties take a chance of gain or loss without intending that the sale which they nominally make shall ever become a legitimate business transaction.*"

The statute in question was enacted in 1874, and in September, 1875, the Supreme Court of the State of Illinois decided the case of *Wolcott* v. *Heath*, 78 Ill., 433. In that case a commission firm of Chicago brought suit against the defendant to recover from him certain sums of money due it for commissions and advancements made by it for the defendant in transactions upon the Board of Trade in Chicago, which transactions were *bona fide* purchases and sales of grain, and not in a strict legal sense option contracts, or in other words "puts" and "calls." The court gave judgment for the plaintiff, and said:

"Our present statute was not in force when these

> dealings were had consequently the rights of the parties are not affected by it. What the law prohibits and what is deemed detrimental to the public interests is speculations in differences in market values."

This quotation was *obiter*, but shows that the court in 1875 understood that the evil to be remedied was the practice of selling and buying grain or other commodities with the intention of settling in differences.

Again in the case of *Tenney* v. *Foote*, 95 Ill., 99, we have a similar state of facts. The plaintiff, the assignee of Hooker & Co., a firm of commission merchants, brought an action on a promissory note to recover the sum of $5,000 payable to the order of the defendant, who had endorsed it to the assignor, Hooker & Co. The defense to the action was that the note had been given by the defendant to the plaintiff's assignor in settlement of certain gambling transactions carried on by Hooker & Co. in behalf of Foote. The evidence in the case shows that Foote made a contract with Hooker & Co., brokers, to purchase and sell for him upon the Chicago Board of Trade grain and other produce, it being agreed between the parties that no grain or other produce should ever be delivered to Foote, but that it should be bought and sold for future delivery and settlement be made between the brokers and Foote upon the difference in the market prices, it being understood that in the event a profit resulted from the transactions that Hooker & Co. were to pay the profit, less their commissions to Foote, and in the event there was a loss Foote was to pay the loss to Hooker & Co. The evidence shows that the transactions carried on by the parties upon the Chicago Board of Trade were the actual purchase and sale of the commodities and not, strictly speaking, option contracts. The opinion of the Appellate Court, which was affirmed by the Supreme Court of Illinois, after quoting

Section 130 of the Criminal Code, contains the following:

"The question whether or not the original contract between Foote and Hooker & Co. falls within this statute, is the turning one in the whole case, so far as the defense is concerned. There has been much difference of opinion as regards the nature of the contract prohibited. It must be, to fall within the prohibition, a contract to have to one's self, or give to another, an option to sell or buy some commodity at a future time. The word 'option' is one much in use on the Chicago Board of Trade, and probably has more than one sense given it there. Boards of Trade, for dealing in the principal products of the country, are of comparative recent origin. The system seems to have been borrowed from, and, in its general features, modeled after, the more ancient institution known as the stock exchange, in which many phrases, words and terms of peculiar local meaning came into use; and it will be found that many of these have been carried into and adopted in boards of trade. Now the word option was in use long ago in the stock exchange, and seems to have acquired a definite meaning. As there used, it meant 'A stipulated privilege to a party in a time contract, of demanding its fulfillment on any day within the specified limit.' Webs. Dict., Ed. 1872, p. 917.

"In practice on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right or privilege of selling or buying; and it is the contracting for such choice, right or privilege of buying or selling at a future time any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified. The statute was passed

from motives of public good, and to repress an evil. Hence, it follows from established rules of law, and their analogies in such cases, that no matter what form the transaction bears as to the terms of the contract, still, if such form be colorable only, and the real intention of the parties be that there is to be no sale of the article—no delivery or acceptance of it—but the transaction to be adjusted only upon differences, it is a gambling transaction within the statute.

"*In Grizewood* v. *Blain*, 11 C. B., 73, E. C. L. Reports 538, suit was brought upon a contract for the sale of shares of stock. The defense was that it was a gambling transaction under a British statute likeours. There was a contract in form, but the chief justice left it to the jury to say what was the plaintiff's intention at the time of making the contract—whether either party really meant to purchase or sell the shares in question, telling them that if they did not, the contract was, in his opinion, a gambling transaction, and void. The jury found for the defendants. Of course there were circumstances in evidence tending to show their intention. On motion for new trial before the full bench, the direction of the chief justice to the jury was held to be right, the court holding that the intention of the parties that there should be no delivery of the stock, that they should settle upon differences, rendered it a gambling transaction and void. *Steers* v. *Gashley*, 6 Durnf. and East., 61; *Brown* v. *Turner*, 7 Id., 630."

The court held that the transactions of the parties which were not strictly speaking option contracts came within the statute and decided in favor of the defendant.

This citation shows: first, that at the time of the decision, namely, October, 1879, the term "option" had a general significance of a transaction in which the parties intended to settle in differences; and second, the confusion in the meaning of the term "option" at the time the law was enacted, namely, 1874, as well as at the time the decision was rendered in 1879. It further shows that the evil which it was

sought by the law to prevent were transactions in which the parties to them intended to settle in differences.

The case of *Grizewood* v. *Blain*, 11 C. B., 73, cited in the opinion, was not a case in which the parties either bought or sold a put or a call, but it was a case in which there was an actual sale or purchase of railway shares where neither party intended to deliver or accept the shares but merely to pay the differences according to the rise or fall of the market.

The case of *Pearce* v. *Foote*, 113 Ill., 228, arose out of exactly the same state of facts as the case of *Tenney v. Foote* heretofore cited. The contracts were the purchase and sale of the commodity with the intention of settling on differences and not option contracts. In the case of *Pearce* v. *Foote* the court held that the contracts entered into by the parties came within the provisions of Section 130 of the Criminal Code of Illinois, and said:

> " . . . *It needs no illustration to make it apparent the contract between plaintiff and Hooker & Co., as the trial court must have found it from the evidence, comes exactly within the meaning of section 130 of the Criminal Code, that declares:* 'Whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain or other commodity shall be subject to a fine or imprisonment, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' It is seen this statute forbids anyone to contract to have or to give to himself or to contract to give to another *the privilege to deal in options.* That is precisely what Hooker & Co. did. They contracted to give to plaintiff the privilege to deal in options and settle with them upon differences as indicated or determined by the fluctuations of the market. That is one of the offenses against which the statute is levelled. . . . *The agreement, as the trial court was authorized to find it is, that Hooker & Co. contracted to give plaintiff the privilege to deal in options with or*

through them, and if there was a loss plaintiff was to pay it to them, and if there was a gain Hooker & Co. were to pay it to them, and for their services they were to be paid a commission. . . . Although the statutes being considered are highly penal there is no warrant for construing them with any unreasonable strictness. They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished—*to prohibit all dealings in options in grains or other commodities.* . . . Considerable fortunes secured by a life of honest industry have been lost in a single venture in *options.* The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the Board of Trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law and receive its sanction and all the support that can be given to them. *It is only against unlawful 'gambling contracts' the penalties of the law are denounced,* and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished."

The court in this decision, measured by its later decisions, manifestly made a mistake, although in our opinion the court was right. The court under its later decisions erred in holding that the contract entered into came within the provisions of section 130 of the Criminal Code, although the contract in itself was unlawful and void under the common law for the reason that it was a gambling contract, and reference to the case shows that the transactions of the parties were the actual purchases and sales of the commodities with the intention of settling upon the differences in the market value of the commodities bought and sold. This case, however, shows into what confusion the court had fallen as to the meaning of the word "option," and that at the time the decision was made, namely, 1885, and prior to that time, the term "op-

tion" was used to signify any contract of purchase or sale upon the Board of Trade wherein the parties did not intend to deliver the commodity, but intended to settle in differences.

The case of *Cothran* v. *Ellis et al.*, 125 Ill., 496, was a case in which the plaintiffs brought suit against the defendant to recover upon a note which the defendant had given to them in settlement of certain transactions which he had employed them to carry on for him upon the Chicago Board of Trade. The transactions were the actual purchase and sale of grain and produce, and the courts below found as a matter of fact that there was no gambling in the transactions; the court above held that there was, in its opinion, no intention to deliver the commodities, but only to settle in differences, though it did not disturb the judgment, because not at liberty to re-examine the facts. It took occasion to hold that at this time, namely, 1888, the word "options" had a peculiar significance and a different one from its technical meaning when applied to a pure option contract. We quote the following *obiter* from the opinion of the court:

> "But leaving both sections of the statute cited entirely out of view, we are clearly of opinion that dealing in 'futures' or 'options,' as they are commonly called, to be settled according to the fluctuations of the market, is void, by the common law, for, among other reasons, *it is contrary to public policy.* It is not only contrary to public policy, but it is a crime—a crime against the State, a crime against the general welfare and happiness of the people, a crime against religion and morality, and a crime against all legitimate trade and business. This species of gambling has become emphatically and pre-eminently the national sin. In its proportions and extent it is immeasurable. In its pernicious and ruinous consequences it is simply appalling. Clothed with respectability, and entrenched

behind wealth and power, it submits to no restraint, and defies alike the laws of God and man. With despotic power it levies tribute upon all trades and professions. Its votaries and patrons are recruited from every class of society. Through its instrumentality the laws of supply and demand have been reversed, and the market is ruled by the amount of money its manipulators can bring to bear upon it. These considerations imperatively demand at the hands of the courts of the country a faithful and rigid enforcement of the laws which have been ordained for the suppression of this gigantic evil and blighting curse."

The Supreme Court of Illinois in the case of *Schneider* v. *Turner*, 130 Ill., 28, gave a new interpretation to the act from that which it had theretofore held was the proper significance to be attached to the law. In that case the plaintiff sought to recover upon the following option contract:

"CHICAGO, November the 11th, 1885.

"In consideration of one dollar, and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Snyder, William L. Peck, Ferd. W. Peck, 1786 shares of the capital stock of the North Chicago City Railway at $600 per share if taken on or before the 15th day of December, 1885.

"V. C. TURNER."

Although the above contract was held by the court not to be tainted with any element of immorality it held that it came within the statute. The court said:

"Prior to this act is was lawful to contract to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. There was and is nothing illegal or immoral in an option contract in itself."

The court in so construing the law reasoned that it must

have been the intention of the legislature to declare that unlawful which theretofore had been lawful, and as all contracts for the purchase or sale of commodities in which the parties intended to settle in differences were void at common law it must follow that the legislature did not intend to declare unlawful contracts which were already unlawful. It boots nothing to question the reasoning of the court here, but suffice it to say that gambling in grain, although unlawful, being against public policy, had not prior to the enactment of this statute been declared to be an offence against the peace and dignity of the people, and the reason that animated the legislature was probably the taxing of a heavy punishment against persons who bought or sold grain or other commodities with the intention of settling in differences. There is no other form of gambling which by the laws of the State of Illinois is made a penal offense subject to a fine not exceeding $1,000 and imprisonment for one year, and it is therefore probable that the legislature intended to prohibit gambling in grain by making it highly penal for any person to engage in such gambling. The most common form of gambling in grain and other commodities is the actual purchase and sale of the commodity with no intention of delivering the commodity and with the intention of settling in differences. While there are hundreds of cases in the reports in which the courts have found that the parties to the contracts upon which the cases arose engaged in the actual purchase and sale of commodities with the intention of settling in differences contrary to the statutes of many of the states, there is only one case in all the books where the court found that either of the parties intended to gamble through the instrumentality of a put or a call which must be transformed into an actual contract of purchase and sale before the parties can settle in differ-

ences, and that is the case of *ex parte* Young, 6 Bissell, 53, in which Peyton R. Chandler and Chandler, Pomeroy & Co. are shown to have endeavored to corner the oats market of the Chicago Board of Trade and in so doing had entered into "put" contracts giving to some 125 persons the option to sell to Chandler and Chandler, Pomeroy & Co. oats at the price of forty-one and one-half cents per bushel on or before the 30th day of June, 1872. On the 18th of June the firm of Chandler & Company failed and oats went down to twenty-six cents and the parties holding the options tendered the grain to Chandler which Chandler refused to receive, whereupon action was brought to recover the difference in the price offered in the option and the actual market price upon the day of delivery. Judge Blodgett held that the parties who bought the options to sell the oats intended to gamble and that it was a fight between them and Chandler, Pomeroy & Co., wherein the parties who purchased the options were betting that Chandler, Pomeroy & Co. could not corner the market and therefore denied their action except to the extent that they might recover from Chandler, Pomeroy & Co. the amounts which they had paid for their options. It therefore appears that the case of *Schneider* v. *Turner* judicially legislated out of Section 130 of the Criminal Code of Illinois gambling contracts wherein the parties actually purchase and sell the commodity with the intention of settling upon differences, which transactions are often called options, and substituted in place thereof legal and moral option agreements. *Schneider* v. *Turner* was affirmed in the case of *Schlee* v. *Guckenheimer*, 179 Ill., 593, where the court said:

> "By the common law contracts of this character are valid as under the common law the contract to have or give an option to sell or buy at a future time grain or other commodity was neither voidable nor void."

The practical operation of Section 130, as construed by the Supreme Court of the State of Illinois and by which construction we must here determine its constitutionality, is seen from the following cases:

Corcoran v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390.

In that case a coal company sent a written offer to a coal dealer to sell and deliver 12,000 tons of coal at the dock of the latter at prices named, in which offer, after reciting the terms of payment, it was stated:

> "Should you require any coal on our dock, we will name you fifty cents per ton in advance of above prices during the season, provided you purchase the above order from us,"

which offer was accepted. The court held that the offer and acceptance constituted a complete contract for the sale and purchase of 12,000 tons of coal independent of the option clause, but that, in so far as an option was attempted to be given or secured, the contract was void under Section 130 of the Criminal Code, although the contract was such an one as any prudent merchant would enter into who expected to have large sales and desired to know the price at which he would be able to obtain the coal before entering into any agreements to sell it. The contract the court held was in every sense moral, but inasmuch as it came within Section 130 as such section had been construed in the case of *Schneider* v. *Turner*, it could not be enforced.

In the case of *Kerting* v. *Hilton*, 51 Ill., App. Ct. Rep., 437, an agreement providing for the employment of a party in the manufacturing business and giving him the privilege of buying the plant on or before a day mentioned, but containing no promise or undertaking on his part to buy it, was held to be a mere option contract and void un-

der the statute, although it contained no element of immorality. See, also,

Ubben v. *Binnian*, 78 Ill. App. Ct. Rep., 330.

McKeon, Receiver, et al. v. *Wolfe*, 77 Ill. App. Ct. Rep., 325.

Wolsey et al. v. *Neeley*, 62 Ill. App. Ct. Rep., 141.

Peterson v. *Currier*, 62 Ill. App. Ct. Rep., 163.

Schlee v. *Guckenheimer*, 179 Ill., 593.

In all of these cases there was not an element of immorality or intimation that the parties intended to settle their agreements upon differences, yet the court held that they came within the inhibition of Section 130 of the Criminal Code.

These cases have been cited for the purpose of showing the state of the law in Illinois, and the extent to which the right of the citizen to make moral contract has been invaded through erroneous judicial construction.

It is a matter of common knowledge that the most common and ordinary form of gambling in grain or stocks is the actual purchase and sale of grain or stocks with the intention at the time of settling in differences. There are hundreds of civil cases in which it has been found by the court that the parties did sell and purchase commodities for future delivery with the intention of settling in differences, yet because that is true the legislature would not have the right to prohibit all sales for future delivery. The right of the legislature to prohibit the making of all contracts in which the parties intend to settle in differences, because such contracts are immoral, and to make it a highly penal offense for a person to engage in such gambling, is conceded; the power to prohibit the sale of all commodities for future delivery, whether the parties intend to settle in differences or not, is denied, and to sustain such power would

be to practically annihilate commerce. The farmer sells his grain and cattle for future delivery before the crops are harvested or the cattle fattened. The manufacturer sells his output for future delivery before he has manufactured the goods; the wholesale merchant sells his merchandise for future delivery months before the goods have been delivered to him, and so on through all the fields of commerce, sales for future delivery are indispensable.

No one will contend that the legislature has such right to prohibit the purchase and sale of commodities for future delivery where the parties intend to deliver the goods and do not intend to settle in differences. How much less power would the legislature have to prohibit a legal moral option contract, which is far less a medium for gambling in grain or other commodities and a much more cumbersome contract for such gambling. But this court is bound by the construction which the Supreme Court of the State of Illinois has given to the act in question, namely, that it applies to every strictly speaking option contract, whether the same is moral or immoral. We contend that the act so construed is an unreasonable exercise of the police power and in violation of the constitution.

We do not contend, however, that an act of the legislature would be unconstitutional making unlawful either a contract of purchase and sale or an option contract in which the parties intended to settle on differences. We insist that the defendant is not guilty of any offense against the peace and dignity of the People of the State of Illinois, for the reason that he did not gamble. The evidence is this cause shows him to have been guilty of an act made criminal by Section 130 of the Illinois Criminal Code, as construed by the courts of that state, which act is wholly innocent and moral in itself.

The legislature intended to prohibit gambling, but it

not only did not, as the law has been construed in the Supreme Court of Illinois, prohibit gambling in grain and other commodities in its most common form, but did prohibit the making of a contract which in only one case in all the law books has been found to have been used for the purpose of gambling, and at the same time a contract very important to that class of persons who carry the surplus production of the farmer during the time between its harvest and consumption and thereby maintain a constant market for the products of the producing community. These men are called speculators, and there is a wide difference between speculating and gambling.

In *Kirkpatrick* v. *Bonsall,* 72 Pa. St., 155, 159, the court said:

> "We must not confound gambling, whether it be in corporation stock or merchandise, with what is commonly termed speculation. Some speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think on and weigh, that is, speculate, upon the probabilities of the future in their business transactions, and in this way often exhibit high mental grasp and great knowledge of business, and of affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions, and buy or sell in a *bona fide* way. Such speculation cannot be denounced."

The statute was aimed at the Board of Trade and Stock Exchange, but instead of discriminating between that which is good and that which is bad, between that which is moral and that which is immoral, as all other States of the Union which have enacted laws relating to the subject-matter have done, the legislature (assuming that the Supreme Court was correct in its construction of the law in *Schneider* v. *Turner*) included all contracts to have or give an option, and thereby made the statute void, at least

in so far as it declared that moral option agreements are illegal.

In the machinery of modern industrialism speculation is a necessity, and especially is this true in the distribution of the most important products of the farmer. During the first half of each year the farmer sells the products of his lands much more rapidly than those products are consumed. The man who buys that product and holds it until there is a demand for its consumption is a speculator. He may or may not own a warehouse or a mill; if he buys, not in view of the immediate demands of his trade, but in view of the deferred and prospective requirements of the consumer, he is a speculator. The states composing the Northwest Territory produce largely in excess of the home use, and at times greatly in excess of the world's demand for immediate consumption. At this time there is in the United States accumulated in warehouses and in transit fifty million bushels of wheat alone. Practically all the wheat is owned to-day by speculators, and by far the largest percentage of it is carried by purchases made on the Board of Trade in the City of Chicago. There is approximately five million bushels in the interior warehouses of Minnesota and the Dakotas, and a large percentage of this wheat is sold in Chicago for future delivery. Minneapolis and Duluth are the natural outlets for this wheat, but they have not the volume of speculative trade necessary to take these large offerings and carry them. Consequently the warehouseman, as he buys wheat from the farmer, sells it in Chicago for future delivery when he thinks the market is most advantageous. Thereby he avoids the risk of the market.

The millers in Minneapolis operate in the same way. Each milling company has its brand of flour which requires a special mixture of wheat to make. To insure to

themselves the possession of the desired quantities or grades they buy far in excess of their immediate requirements, and to protect themselves from loss in case of a declining market they sell wheat in Chicago for future delivery, and buy it back as they grind the wheat in their possession and find a market for their flour. If they are producing flour in excess of the current demand, instead of shutting down the mill or reducing the rate of output, they sell wheat against it in Chicago. In Minneapolis to-day there are more than six million bushels of wheat mainly carried in this manner through speculation in Chicago. In Duluth there are more than three million bushels carried in the same manner. There are about thirty-five million bushels en route to European markets from all parts of the world. A merchant in Europe buys a cargo of wheat in California or Australia. It will be months before that wheat becomes available for sale and distribution by him. He sells against it in Chicago for future delivery and reduces the risk of price in the interim. When his cargo arrives, as he disposes of it, wholesale or retail, he buys in his sales previously made in Chicago.

It is, therefore, manifest that the Chicago Board of Trade is the great center of this speculative operation so beneficial and necessary to the moving of the surplus farm products of the world. What is true of wheat is true of corn, hog products and other commodities. Buyers and sellers of farm products all over the world buy and sell through the Board of Trade in Chicago, not because it is the highest market necessarily, or the lowest, but because they can purchase or sell any amount, great or small, with greater facility, less expense and risk, than at any other market. To provide a market for and to distribute the enormous surplus of grain and commodities requires facil-

ities and commercial machinery of the highest order. The simple transaction by which a speculator buys a few wagon loads of wheat of his neighbor and puts them in his own granary to await a period of less plenty and higher prices will not furnish a market for a hundred million bushels. A large central market, great numbers of contributors, immense sums of money, insurance companies, warehouses, railways, steamships, telegraph companies, banks and clearing-houses are needed. The machinery of speculation is highly complex. The freedom to buy and sell must be unrestricted and the facilities for buying and selling and for the fulfillment of contracts must be of the highest order. Here is where the prejudice that finds lodgment in the public mind and its echo in the courts has its origin. They very complexity of the machinery by which the trade is carried on bewilders the uninitiated. For a long time the courts looked askance at the devices for settling trades by mutual cancellation through the clearing-house, thus avoiding the risk and labor of an actual physical delivery of the warehouse receipts. The legitimacy of these transactions is now well established in law. Another and fruitful source of prejudice is that speculative purchases and sales are seldom for immediate delivery. Here, as everywhere else in trade, the wholesale price is less than the retail price. The man who makes a business of it buys large sums of cash grain and sells it for delivery six months ahead. He gets favorable terms on storage, lower rates for money, and cheap, long-term insurance. He can sell that grain to a speculator for future delivery at a price less than it would cost the speculator to buy the cash grain and carry it himself. There are in Chicago at this time upwards of twenty-five million bushels of wheat carried in this way by purchase for future delivery. The buyer at the country station, the shipper,

miller and exporter, the importer, all make the bulk of their sales for delivery at some future time. It follows that along with the custom of making contracts for purchase and sale of products for delivery at some future time has grown the necessity of making unilateral contracts to buy or sell within a definitely prescribed time. These contracts are called "puts" or "calls," and are of vast importance in handling the surplus products of our country. The exportation of grain and its shipment to other places and other states are almost wholly accomplished through the use of what are termed "firm offers." The firm offer is an offer to sell a certain commodity left open by agreement for a certain length of time pending acceptance by the buyer. Almost the entire receipts of grain in Chicago are brought there by the same process. It is brought on offerings to buy, left open by agreement to be accepted or not accepted at some future time. These offers are termed "firm bids."

The transaction for which the plaintiff in error was convicted is termed a call, and this is precisely the same form of transaction as the firm offer, except in a call a consideration is paid the seller for leaving the offer open for a certain length of time. One is a contract, the other is not.

Clark on Contracts, page 50 and citations.

A put is precisely the same thing as a firm bid, except that in a put a consideration is paid the buyer for leaving his offer open. It is the custom on the Chicago Board of Trade for the large firms engaged in the exportation of grain to cable a firm offer to Liverpool or other foreign port offering to sell grain to be delivered in thirty or sixty days at about the market price in Chicago plus the cost of delivery. These offers are made upon the basis of what is known as the London Corn Exchange contract, which is entered into before business is opened up with foreign

dealers. This contract provides that all firm offers which are cabled from Chicago at the close of business shall be open for acceptance until 3 o'clock at Liverpool the following business day, which is 9 o'clock A. M. in Chicago. This contract gives the foreign buyer the whole of the following business day within which to determine whether or not he will accept the offer cabled from Chicago. In cases of unusual disturbances such as we frequently have in foreign countries, or contingencies that are likely to happen on this side, it is a very risky proposition to offer several hundred thousand bushels of grain without any possible insurance as to what the price will be.

Exporters have been accustomed to go into the market and buy what they term their "insurance," namely, a call for the quantity of grain which they offer to export. In addition to paying the seller of the call a sum for the privilege of calling this grain within a certain period, they often pay a premium over the closing price. Then if the acceptances have been considerable and the action of the market is such that it is a saving to take advantage of their option they take advantage of it. If the market has not moved, or if it is lower, so that the grain may be purchased for a less sum, they do not avail themselves of their option and a sale is never made. If an offer to sell wheat has been based upon the market price being ninety cents when the offer is made, and before acceptance wheat should go up to ninety-five cents, a great loss would fall on the exporter; and, therefore, to insure himself against such loss, the seller pays something for the privilege of purchasing wheat at ninety cents, or at ninety and one-fourth cents; or in other words, enters into a contract whereby some one agrees to sell to him grain at a certain fixed price within a definite time. He is thereby sure that should his offer be accepted

he can procure the grain at a price at which he can afford to deliver it.

Mr. Homer H. Peters, a witness who testified in behalf of the defendant, and whose testimony is found beginning on page 18 of the Record, a member of Bartlett Frazer & Co., of Chicago, one of the largest exporters of grain in the United States, testified that the foregoing is a true statement of the manner of doing business upon the Board of Trade in Chicago; the court below ruled out his testimony on the ground that the court took judicial notice that such was the fact inasmuch as it was a matter of common knowledge.

Such option contracts are never settled on differences. It is a matter of common knowledge that all stock and produce exchanges forbid any transaction wherein the parties do not intend to deliver the commodity and intend to settle in differences; and that such exchanges severely punish the members for any violation of the rule. The only place where such transactions can be carried on is in the bucket-shops, and a statute prohibiting the colorable purchase or sale of the commodity wherein the parties did not intend to deliver the commodity, but to settle in differences, if enforced, would cure the defect without prohibiting moral contracts.

As stated heretofore, such transactions as are carried upon the Board of Trade are never settled on differences. The testimony of Mr. William S. Crosby, a witness on behalf of the defendant, which is found beginning on page 22 of the Record, fully sustains this statement; his testimony was ruled out by the court upon the ground that the statements of the witness were matters of common knowledge, and the court would take judicial notice of their truth.

It has been a common practice for buyers of grain throughout the country, as they buy from the farmers from

day to day, the amount which they pay being governed by the Chicago market price, and it taking them a day or two to get the grain which they buy into Chicago, to protect themselves on the Chicago market against the fluctuation of grain by buying puts; in other words, by entering into an agreement with some person in Chicago upon the Board of Trade whereby that person offers to buy grain, and for a consideration paid to him agrees to leave the offer open for a certain time. Such purchases and sales are never settled by differences, and are never intended to be so settled. They are essential and necessary to the distribution of the products of the farmer and should not be prohibited.

It is necessary that these offers to buy and sell be made in good faith, and that the party who has offered to sell for exportation or future delivery large quantities of grain as against his option purchases should have some assurance that these offers to sell to him will remain open for a specific time. It is, therefore, best that these offers should be merged into contracts to have the option by the payment of a consideration. Section 130 of the Criminal Code declares such contracts to be illegal when supported by a consideration. It hardly need be suggested that the agreement to leave the offer open, when supported by a consideration, is the more legitimate of the two. In the one there is a a moral obligation; in the other both legal and moral.

Option contracts are not immoral, nor were they illegal at common law.

In *Schneider* v. *Turner*, 130 Ill., 28, the court went so far as to say that—

> "Such contracts are neither void nor voidable at the common law. There was or is nothing illegal or immoral in an option contract in itself."

The court affirmed this position in *Schlee* v. *Guggenheimer*, 179 Ill., 593, and it is now well settled that a court

of equity may decree the specific performance of option contracts.

The statute in question was enacted to prohibit and punish gambling. It is entitled "Gambling in Grain," etc. Yet the State is seeking by this prosecution to punish the plaintiff in error for a *bona fide* moral commercial transaction which contained no element of gambling. By the mere insertion of a few words in the statute it may be made one beneficial to the whole community, but the legislature, by leaving out those words, have rendered it, with its accepted construction, obnoxious to the Constitution. How easy it would have been to have said, "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold," *with the intention of not delivering the property and settling in differences,* etc.

Section 6934*a* of Bates' Annotated Statutes of Ohio, 2nd Edition, contains the laws of Ohio relating to this subject, which are almost in the identical langauge of the Illinois statute except for the provision which limits the effect of the law to contracts where the parties did not intend to deliver the commodity sold, but only to pay the differences. The Ohio statute in full is as follows:

> " Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to such commodities, shall be fined not less than $20, nor more than $500, or confined in the county jail not exceeding six months, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void; *provided that the provisions of this law shall only be held to mean and apply to*

such contracts where the intent of the parties thereto is that there shall not be a delivery of the commodity sold, but only the payment of differences by the parties losing upon the rise or fall of the market."

In the case of *Lester* v. *Buell*, 49 Ohio St., 240; 34 Am. St. Rep., 556, the Supreme Court of Ohio decided that the above statute applied to contracts for the actual purchase and sale of commodities in which the parties did not intend to deliver or receive the commodity, but to settle in differences, giving to the word "option" the significance that has often been attached to it of a gambling transaction.

Many of the states of the Union have enacted laws making it an offense to gamble in grain or other commodities, but in no case except that of Illinois have the legislatures failed to expressly confine the operation of the law to those cases of the purchase and sale of commodities where the parties did not intend to deliver the goods, but intended to settle on differences.

Vermont Statutes, 1894, Sec. 5128-30.

Rev. Statutes of Missouri, 1889, Sec. 3831-2.

Constitution of Louisiana, 1898, Art. 189.

Compiled Laws of Michigan, 1887, Sec. 11373-5.

Code of Iowa, 1897, Sec. 4967-8.

Sanborn & Berriman's Ann. Statutes of Wisconsin, 1890, Sec. 2319*a*.

Code of Tennessee, 1896, Sec. 3166-7-8.

Ann. Code of Mississippi, 1892, Sec. 2117.

This is a natural distinction for the legislature to make. There can be no other possible definition of gambling in grain or other commodity except a contract to buy or to sell grain or other commodity for future delivery, where the parties to the contract do not intend to deliver the grain or other commodity, but intend to settle on the differences between the market values at the time of the contract and at

the date of delivery. This, or language substantially like it, fully covers every transaction for the purchase or sale of grain wherein the parties intend to gamble, and the legislature, by making an act described in such terms an offense, could cover every possible case in which the parties intended to gamble. It is, therefore, an unnecessary and unreasonable exercise of the police power of the legislature to prohibit *bona fide* moral option contracts in order to prohibit gambling, especially in view of the fact that gambling in grain and other commodities is seldom resorted to through the instrumentalities of option contracts, strictly speaking, but is carried on in its most common form in contracts for the actual purchase and sale of the commodity. In fact, under the contract under which the plaintiff in error was punished there could be no settlement in differences. He paid ten dollars for the "call" on the grain within the time specified. Suppose that within that time the market had fallen ten cents per bushel. In that case he would doubtless have purchased the corn elsewhere and lost the ten dollars paid. The Weare Commission Company would not have paid him anything. There can be no settlement in differences under such a contract or until the purchase or sale is actually contracted. Therefore, we contend that the legislature in prohibiting the making of *bona fide* moral option contracts deprived the citizen of liberty and property without due process of law.

The State of Arkansas enacted a statute providing that the "buying or otherwise dealing in what is known as futures for any cotton, grain, or anything whatsoever, with the view to profit is hereby declared to be gambling."

The Supreme Court of Arkansas, in the case of *Fortenbury* v. *State*, 47 Ark., 188, construing this statute to apply to actual gambling transactions, said:

"This phrase has acquired the significance of a

mere speculation upon chances, where the grain, cotton or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference of the market. When so limited by judicial interpretation the statute is not inconsistent with public policy. It forbids and punishes wagering contracts; that is, contracts which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of any such gain or loss."

The court by implication held that if this statute must be construed to apply to all contracts for future delivery which a broad interpretation of the language might justify, then it would be unconstitutional.

In the case of *State* v. *Gritzner*, 134 Mo., 512, an indictment charged in several counts that the defendant sold grain with no intention of delivering and sold grain on optional delivery in contravention of Section 3131 of the Revised Statutes of Missouri, which statute declared all purchases and sales or pretended purchases and sales of commodities when the parties had no intention of receiving or paying for the property or delivering the same, or the buying or selling, or pretended buying and selling, on margins, or on optional delivery, when the party selling, or offering to sell, does not intend to have the property on hand or under his control to deliver, to be gambling, and unlawful, and providing a penalty in the event any person should be found guilty of violating the provisions of the statute. It will be observed that the statute makes the distinction between lawful contracts for optional delivery, or for the purchase and sale of commodities, and contracts in which the parties did not intend to deliver the commodity but to settle on differences. In this case the statute was attacked upon the ground that it deprived persons of liberty and

property without due process of law, and concerning the point the court said:

> "The other point that the statute is violative of that provision of the constitution which commands that no person shall be deprived of life, liberty or property without due process of law (Sec. 30, Art. 2), may be very briefly disposed of by saying, while that section secured the undoubted liberty to contract in a lawful way, yet that does not include nor grant the license to gamble."

The court held the statute constitutional because it affected only unlawful contracts.

In *Holden* v. *Hardy*, 169 U. S., 366, the court said:

> "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a State law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

In the case of *Allgeyer* v. *Louisiana*, 165 U. S., 578, 589, the court said:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

See also

State v. *Goodwill*, 33 W. Va., 179.

Braceville Coal Co. v. *People*, 147 Ill., 66.
Munn v. *Illinois*, 94 U. S., 113.
Commissioners v. *Perry*, 155 Mass., 117.
In re Grive, 79 F. R., 167.
State v. *Fire Creek Coal & Coke Co.*, 33 W. Va., 188.

In the case of *Toledo, etc., Railway Company* v. *Jacksonville*, 67 Ill., 37, the court said:

> "Under pretense of making police regulations the legislature cannot enact laws unnecessary to the preservation of the health and safety of the community, or prohibit that which is harmless in itself."

In *Wilkinson* v. *Leland*, 2 Pet., 627, Justice Story said:

> "A legislature may enjoin, forbid and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt or punish innocence as a crime."

In the case of *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S., 285, 301, Mr. Justice Harlan said:

> "The reasonableness or unreasonableness of a State enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority or is to be deemed a legitimate exertion of the power of the State to protect the public interests or promote the public convenience."

In the case of *Hartford Insurance Company* v. *Chicago, Milwaukee & St. Paul Railway Company*, 175 U. S., 91, 106, the court, quoting from the opinion of Sir George Jessel, M. R., in *Printing Company* v. *Sampson*, L. R., 19 Eq., 462, 465, said:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

The principle which underlies the exercise of the police power is best stated in the idiom *sic utere tuo ut alienum non laedas*. This is the best expression of the extent of the police power; that cannot be prohibited which is not harmful.

In the case of *State* v. *Noyes*, 46 Me., 189, the court said:

> "With the legislature the maxim of law *salus populi lex* should not be disregarded. It is the great principle upon which the statutes for the security of the people are based. It is the foundation of criminal law in all governments of civilized countries and of other laws conducive to the safety and consequent happiness of the people. This power has always been exercised and its existence cannot be denied. How far the provisions of the legislature can extend is always submitted to its discretion provided its acts do not go beyond the great principle of securing the public safety and its duty to provide for the public safety within well defined limits and with discretion is imperative."

Tiedemann on Constitutional Limitations of Police Power, Sec. 1.

Can there by any doubt that the legislature went beyond well-defined limits in the act denying to persons

the right to enter into option contracts? If it were difficult to distinguish between what contracts are moral and what contracts are immoral, then there might be some ground for the action of the legislature. But inasmuch as the distinction is so plain and the ability to prove an act to be gambling so easy, it is almost ridiculous to say that in order to provide for the public safety it is necessary to prohibit all option contracts, strictly speaking. Would it be contended for an instant that because some men have made contracts for the sale of property to be delivered at a future time without any intention of ever delivering the property and with the intention of settling upon differences, that the legislature would be authorized to prohibit all contracts for the sale of property to be delivered in the future? Such an enactment would practically prohibit the sale of property, for perhaps not one-tenth of the property sold in commercial pursuits is sold for present delivery.

Option contracts are entered into in nearly every line of business. The manufacturer contracts to have an option to purchase coal at a certain price. Steel mills contract to have an option to purchase iron ore as required at a certain price. Woolen mills contract to have an option to sell all they manufacture to a wholesale house at a given price. Men hire themselves out and as a part consideration of their labor take an option to purchase a manufacturing plant. Millers buy grain, and in the event the same shall be proven satisfactory take an option to purchase additional quantities thereof. The government of the United States in the war with Spain, not knowing how long the war may last, enters into option contracts to purchase supplies for the maintenance and comfort of the soldiers in the field. And so there are many conditions in which a conservative

business man deems it important to his interests to take an option to purchase a commodity, and likewise men make option contracts to sell, not knowing for sure what quantity of goods they may be able to furnish. *Disborough* v. *Nelson*, 3 Johns. Cas., 81.

Should a man desire to acquire the control of a corporation, or the larger interest in a copartnership, the law, as it is now construed in Illinois, makes it unlawful for him to contract to have an option with each of the stockholders of the corporation, or with the members of the copartnership, to buy their interest until he is able to ascertain whether or not he can obtain from the different members a majority of their stock or interest.

As a matter of fact, an option contract is a most cumbersome instrument in which to gamble in grain or stocks. If a member of the Board of Trade has contracted to have an option to purchase 10,000 bushels of corn at thirty-one and one-half cents at any time within ten days, and during that time the market rises, if he desires the grain he calls the corn, which would be delivered to him. If the market goes down, instead of calling the grain to be used for the purpose for which he intends to buy it, he goes into the market and purchases grain of the same quality at a less figure. Such is also the case of contracts for the buying and selling of grain upon the Board of Trade for future delivery. One unfamiliar with the conditions might wonder wherein the much-talked-of gambling transactions upon the Board of Trade arise. As a matter of fact, in the contracts entered into between the members of the Board of Trade there is no gambling. Each party must intend to deliver the grain and is required by the rules of the Board to deliver it, unless the members' deals are settled through the clearing-house, when there is a constructive, if not a physical, delivery of the warehouse receipts.

The gambling transactions, if there are any such, are between the brokers and their clients, in which the brokers agree to deal for their clients in options, to use that term in the sense it is sometimes used as meaning contracts for the actual purchase and sale of commodities where the parties do not intend to deliver the commodity, as distinguished from a strictly legal option contract. The reports are full of such cases. Often the clients do not know that they ever had a bushel of wheat. In fact, they never intended that any should be delivered to them; nor have many of them the money to purchase the grain they order their brokers to buy for them. In such transactions, however, the grain is actually delivered to the broker, and although such persons trading through a broker may intend that no grain shall be delivered, yet the broker's transactions upon the Board of Trade, wherein he purchases and sells, are *bona fide* commercial transactions where delivery is not only intended but actually accomplished.

The remedy for such transactions is not to prohibit option contracts, for the "gigantic evil" of which the Illinois Supreme Court has in several of its opinions spoken, did not arise out of contracts to have or give an option, but out of contracts for the purchase or sale of commodities where the parties did not intend to deliver or receive the goods, but to settle in differences, which sometimes in the nomenclature of the business are called "options."

This court in a long line of cases has held that while in the exercise of the police power the States may prescribe rates to be charged by railways and other corporations exercising public or *quasi* public functions, yet this power is subject to the limitation that such rates must be reasonable; that the question whether the rates prescribed are in fact reasonable is a judicial question; that to compel such companies to perform their services for less than reasonable

rates is to deprive them of property without due process of law. *Stone* v. *Farmers Loan & Trust Company,* 116 U. S., 307, 331; *Chicago, etc., Railroad Co.* v. *Minnesota,* 134 U. S., 418; *Chicago, etc., Railway Co.* v. *Wellman,* 143 U. S., 339; *Regan* v. *Farmers Loan & Trust Co.,* 154 U. S., 362; *Covington & Turnpike Co.* v. *Sandford,* 164 U. S., 578; *Smyth* v. *Ames,* 169 U. S., 466; *Lake Shore, etc., Railway Co.* v. *Smith,* 173 U. S., 684.

Such companies are not more within the protection of the Fourteenth Amendment than is the citizen. In fact the corporation and the citizen are equally "persons" within its terms. It is true that congress is given power over the subject of commerce, and that these public service corporations have in many instances successfully resisted the unwarranted or pretended exercise of the police power for the reason that it interfered with interstate commerce. In other cases these attempts have been frustrated on the ground that their application invaded property rights. These rights are equally protected under the Constitution. The right to untrammeled commerce is no more sacred under that instrument than the rights of life, liberty and property. The commerce clause confers no greater power on the federal judiciary to set aside unwarranted State legislation when invoked by a public service corporation, than does the Fourteenth Amendment when invoked by the humblest citizen. The rights secured to the citizen as against national action, through the guarantees of the first ten amendments, were secured by this amendment, along with those contained in the original Constitution, from invasion by the State through any of its agencies. It is not necessary in this case to consider whether in the protection of these rights against the abuse of the police power he is not equally entitled to adduce evidence establishing such exercise to be unreasonable.

Here it has been repeatedly declared by the Supreme Court of Illinois that the kind of contract involved was at common law and in the forum of morals perfectly legal and free from blame. The right to contract is one of the rights of freeman, of every person not under disabilities. The only limitations which may constitutionally be placed thereon must have a reasonable and necessary relation to the public health, safety or morals. It cannot injure any of these that A., not knowing whether the exigencies of his business will require him to deliver one hundred thousand more bushels of corn than he possesses, pays B. one hundred dollars for the privilege of purchasing it from him if he desires; of if he thinks that perhaps his family will be suited with B.'s country estate pays him a like sum for the option to take it within a time named. There is no element of gambling in these transactions and to make them unlawful is to declare that a man may not provide conditionally for the exigencies of his business or the satisfaction of his desires. Commerce cannot be conducted under such a hard and fast rule. All reasonable demands of the State will be satisfied if this court shall hold that in the exercise of its police power on this subject it is limited to contracts where the intention is present to settle in differences and may not forbid contracts confessedly moral and in no way capable of doing injury to the public. Such a construction, it is submitted, is well within the principles announced by this court in *Mugler* v. *Kansas,* 123 U. S., 623, 661, 663, 664; *Minnesota* v. *Barber,* 136 U. S., 313; *Brimmer* v. *Rebman,* 138 U. S., 78; *Lawton* v. *Steele,* 152 U. S., 133, 136; *Holden* v. *Hardy,* 169 U. S., 366, 392; *Collins* v. *New Hampshire,* 171 U. S., 30, 34, and other cases above cited.

It is submitted that the statute, in so far as it is construed by the Supreme Court of the State of Illinois to pro-

hibit the making of *bona fide* legal moral option contracts, is an invasion of the rights of liberty and property guaranteed by the Constitution of the United States; that the plaintiff in error was not guilty of any offense against the peace and dignity of the people of the State of Illinois, and that the judgment of the court below should be reversed.

CHARLES H. ALDRICH,
LEE D. MATHIAS,
Attorneys for Plaintiff in Error.

No. 201.

Reply Brf. of Aldrich & Lee P. C.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 201.

ALFRED V. BOOTH, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY ARGUMENT.

CHARLES H. ALDRICH,
Of Counsel for Plaintiff in Error.

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The plaintiff in error was convicted of a violation of section 130 of the Criminal Code of Illinois, which is as follows:

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars, nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void" (Record, p. 6).

The offense for which the plaintiff in error was indicted and convicted under this statute consisted in entering into a contract with the Weare Commission Company, doing business as a commission company in Chicago and on its board of trade, by which he reserved the right to buy at any time within ten days ten thousand bushels of corn at 31½ cents per bushel, and paid a consideration for this privilege, which he subsequently exercised, and the corn was delivered to him (Record, p. 17). There is no claim made that the transaction was not in the utmost good faith. The Weare Commission Company had the corn to sell; at least, there is no hint in the evidence to the contrary. The plaintiff in error, not knowing whether the exigencies of his business would require this corn, paid for the privilege of taking it at the price named if he should require it—as he subsequently did.

For this transaction he was indicted and punished as a criminal.

Against these proceedings, at every stage, he sought to interpose the shield of the Federal Constitution, asserting that such action by the State deprived him of his liberty and property without due process of law. For this reason he moved to quash the indictment (Record, p. 14), in arrest of judgment (Record, p. 28), and assigned errors based thereon (Record, pp. 30, 31) in the supreme court of Illinois, which decided against the right claimed under the Constitution (Record, p. 35), holding the act in question a proper exercise by the State of its police power.

From this action a writ of error was prosecuted to this court.

Option contracts, as usually understood in the commercial and legislative world, are described by Mr. Tiedeman, in his State and Federal Control of Persons and Property, as follows (vol. 1, p. 470):

"Option contracts are in form contracts for the sale or purchase of commercial commodities for future delivery, at a

certain price, with the option to one or both of the parties in settlement of the contract to pay the difference between the contract price and the price ruling on the day of delivery, the difference to be paid to the seller, if the market price is lower than the contract price, and to the purchaser if the market price is higher. Such a contract has three striking elements: First, it is a contract for future delivery; secondly, the delivery is conditional upon the will of one or both of the parties; and thirdly, the payment of differences in prices, in the event that the right of refusal is exercised by one of the parties. If the common-law offense of *regrating* were still recognized in the criminal law, all contracts for future delivery may be open to serious question. But that rule of the common law is repudiated, and it may now be considered as definitely settled that a contract for future delivery of goods is not for that reason invalid. * * * The late English opinion is generally followed in the United States, and it may be stated as the general American rule, that *bona fide* contracts for the future delivery of goods are not invalid, because at the time of sale the vendor has not in his actual or potential possession the goods which he has agreed to sell."

The author cites many authorities in support of this statement, among others Lewis *vs.* Lyman, 22 Pick., 437; Thrall *vs.* Hill, 110 Mass., 328; Heald *vs.* Builders' Ins. Co., 111 Mass., 38; Currie *vs.* White, 45 N. Y., 822; Bigelow *vs.* Benedict, 70 N. Y., 202; Bruce's Appeal, 55 Pa. St., 294; Logan *vs.* Musick, 81 Ill., 415; Pixley *vs.* Boynton, 79 Ill., 351; Pickering *vs.* Cease, 79 Ill., 328; Lyon *vs.* Culbertson, 83 Ill., 33; Corbett *vs.* Underwood, 83 Ill., 324; Sanborn *vs.* Benedict, 78 Ill., 309; Wolcott *vs.* Heath, 78 Ill., 433; White *vs.* Barber, 123 U. S., 392.

That option contracts as above defined are within the police power of the State we concede. There is the option to one or both of the parties in settlement of the contract to pay the difference between the contract price and the market price on the day of delivery—an element wholly wanting in the contract upon which the plaintiff was convicted. The grain was actually delivered and there could be no gambling

If there had been no delivery there neither would nor could have been any settlement in differences, as, whatever the market, neither party would have been under further obligations to the other.

The statute was enacted at a time (1874) when the above definition, as given by Mr. Tiedeman, was the universal understanding of the term "option contracts" as a means of gambling. There can be no reasonable doubt that such transactions were the objects of legislative condemnation. Gambling in differences had become a great evil, and its corrupting influence was felt in every walk of life. Such contracts in the absence of the statute were illegal and punishable at common law. Owing to this fact the supreme court of Illinois made, as we conceive, one of those mistakes which invade even courts of last resort, and lead to the most unexpected and unforeseen consequences. Inasmuch as contracts to settle in differences were illegal at common law, the court reached the conclusion that it could not have been the legislative intention to make that illegal which was already so, and consequently it must have been intended to apply to contracts that had been perfectly legal and unimpeachable before (Schneider *vs.* Turner, 130 Ill., 28), and this construction has been since adhered to and applied in matters wholly removed from gambling. The error of the court arose from the fact that it failed to note that the primary purpose of the act was to adequately punish gambling, not to define what contracts should be avoided for that taint. The growing evil called for severer punishments, and therefore the offense was made a crime and severely punished, instead of a misdemeanor subject only to a paltry fine. I have noticed this mistake of the court, which I deem obvious, not because I suppose you will sit to review this error of construction, but as a part of the history of the case which has led to this necessary appeal to your powers

under the fourteenth amendment to protect the citizen in his liberty and property against State action.

It is proper now to turn to some examples of this construction of the act.

In Schneider *vs.* Turner, 130 Ill., 28, where this error originated, the contract was as follows:

"CHICAGO, *November the 11th*, 1885.

"In consideration of one dollar and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Snyder, William L. Peck, Fred. W. Peck, 1,786 shares of the capital stock of the North Chicago City railway at $600 per share if taken on or before the 15th day of December, 1885.

"V. C. TURNER."

On this contract the court said:

"Prior to this act it was lawful to contract to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. There was and is nothing illegal or immoral in an option contract in itself."

The contract was avoided wholly because the court imputed to the legislature the intention, not of adequately punishing gambling, but of making something illegal which was not before so.

A like result followed in Corcoran *vs.* Lehigh and Franklin Coal Company, 138 Ill., 390, where the coal company made a written offer to sell and deliver 12,000 tons of coal at a price named, and included in its offer the following:

"Should you require any coal on our dock, we will name you fifty cents per ton in advance of above prices during the season, provided you purchase the above order from us."

Which offer was accepted, the coal taken and paid for. The dealer, desiring to avail himself of the option embraced in the contract, was refused, coal having largely advanced

in price, and the supreme court sustained such refusal because of the statute in question. The court found nothing in the contract in any way immoral or which any prudent merchant should not in the wise conduct of his business reasonably wish to make; and yet it held, owing to the misapprehension above noted, that a statute passed to prevent gambling, in the interest of the public morals, could be used, as in Schneider *vs.* Turner, 130 Ill., 28, for the immoral end of escaping a just obligation. The same thing happened in Keeting *vs.* Hilton, 51 Ill., App., 437, where a party entered the service of a company at an agreed price, and as a part of the consideration reserved to himself the privilege of buying the business within a time limited. It was evident that he would not have entered upon the service apart from this privilege. The court enabled the employer to escape this contract obligation by reason of the statute. What was moral and valid prior thereto and within the contract rights of each person at common law was held to be forbidden by the statute as construed by the supreme court of the State. In every instance where the statute has been applied by the courts it has been in aid of some person seeking to escape plain contract liability and where no element of gambling was present. Thus, in Schlee *vs.* Guckenheimer, 179 Ill., 593, the court, while helping the person in default to escape his honest obligation, said :

"By the common law contracts of this character are valid as under the common law the contract to have or give an option to sell or buy at a future time grain or other commodity was neither voidable nor void."

The court says in its decision of the present case that the purpose of the legislature was to suppress gambling.

"The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is *bona fide* contemplated and intended by the parties, but in con-

tracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article" (Record, p. 37).

This is unquestionably true.

But the court continues:

"Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn and does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of vendor and vendee."

This is important if true. It will be admitted that "coal," "meat," "hay," or other commodity may be substituted in lieu of the word "corn" in the court's statement. All are embraced in the language of the statute, and, as we have seen, one of them has been embraced in the decisions. It is perhaps not important that only one case has been found where such a privilege has been made the instrument of gambling, while multitudes of cases are found where there were purchases and sales. Nor is it perhaps important that there can be no settlement in differences until the call has been made or the property tendered—in other words, until it has ceased to be a privilege and has assumed such a form as, using the language of the court, "creates the relation of vendor and vendee."

Nor is it of the highest importance that if this is good law then every contract of the Army and Navy Department made or to be enforced in Illinois is likewise bad. As is well known, the Departments advertise for supplies—*e. g.*, meat, grain, hay, etc.; bids are solicited and bidders notified that the Department reserves the right to take all or any part of the amount specified. In other words, the Department reserves a call on the commodity. Chicago

dealers were the successful bidders for nearly all the meat contracts during the late Spanish war. Suppose, when the forces were in the field and the commissary department was doing its utmost to forward supplies, the dealers had suddenly repudiated their contracts on the ground they were made unlawful contracts, and so immoral, by section 130 of the Criminal Code of the State. This might happen. The dealers may yet be arrested and punished as criminals for having made such contracts.

While, as I have said, these several facts are perhaps unimportant, they become important when combined and all pointing in one direction.

This court has held (Mugler *vs.* Kansas, 123 U. S., 623, 661) that—

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. * * *

"The courts are not bound by mere forms nor are they to be misled by mere pretences. They are at liberty—indeed are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the constitution."

Tried by this test, it is insisted that a contract valid at common law, moral in all its elements as declared by the court, not used for gambling, incapable of use to create a condition by which a settlement in differences could be made and applied in court decisions only for the immoral purpose of allowing people to violate honest contracts and leading to such absurd results that both the packers and Federal officers who executed contracts for army supplies are subject to fine and imprisonment, cannot be a reasonable exer-

cise of the police power. In fact, no example could be more absurd than that afforded by the case of the plaintiff in error. He is indicted and fined for not knowing before he was advised by acceptances whether he would need the corn or not, or, stating it in another way, he is punished for not buying absolutely on August 16th what he did not know he would need until August 25th or 26th. The necessity for grain dealers making large offers abroad to take this form of insurance or provision for the future is fully set forth in the evidence (Record, pp. 18, 19).

The construction put upon the act by the supreme court of Illinois is obligatory upon this court, and for the purpose of determining the constitutionality of the statute this construction must be deemed a part of the statute (Machine Co. *vs.* Gage, 100 U. S., 676, 677; Geer *vs.* Connecticut, 161 U. S., 519, 522; Erie R. R. Co. *vs.* Pennsylvania, 158 U. S., 431; Forsyth *vs.* Hammond, 166 U. S., 506, 519).

While, as said in Lake Shore & Michigan Southern Railway *vs.* Ohio, 173 U. S., 285, 301, "the reasonableness or unreasonableness of a State enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority or is to be deemed a legitimate exercise of the power of the State to protect the public interests or promote the public convenience," yet we consider that the courts will not set aside such legislation merely because it is unnecessarily harsh and oppressive. As the court said, such fact is an element in the question; but when we add to this element that the act as construed does not have the effect desired, and at the same time takes from the citizen a right of contract belonging to him at common law, having no taint of immorality, we have a plain case of the unnecessary deprivation of liberty and property designed to be protected against State action by the fourteenth amendment.

If this court shall say to the Illinois authorities that in the exercise of the police power you can forbid and punish

every contract where there is present any intention to settle in differences—any element of gambling,—it is not a reasonable exercise of your power, however, to forbid contracts valid and moral at common law and entered into with no intention of gambling, but in the proper pursuit of commercial gain. Contracts for future delivery are the ordinary means by which gambling in differences is accomplished, and yet to forbid persons to buy or sell for future delivery would paralyze commerce and industry and bankrupt the nation. Such a law would not be reasonably necessary to prevent the evil which it is your province and duty to check. Equally the commercial necessities require and the common-law rights of the citizen guaranteed by this amendment demand that the right of contract shall not be unnecessarily abridged or taken away. The citizen is not able to foresee today the demands of his business a month or six months hence. He has a right to take thought for the morrow and contract conditionally upon such necessities just as the owner of the commodity has the same right to make a conditional as an absolute sale. Gambling may be prevented without interference with legitimate commerce. It is not to be tolerated that a citizen who has made an optional purchase of a commodity of commerce and thereafter exercised his option and taken and paid for the same shall be thereafter indicted and punished as having committed a crime.

It is submitted that such limitation upon the police power of the State is within the necessary meaning of the fourteenth amendment and the decisions of this court in Holden *vs.* Hardy, 169 U. S., 366; Allgeyer *vs.* Lousiana, 165 U. S., 366; Williams *vs.* Fears, 179 U. S., 270, 274.

It is not contended that new rights were given the citizen by this amendment, but only a new guaranty, which added the right to seek the judgment of this court in all cases where the claim is made that the guaranty is violated. It is believed that those inalienable rights of man which were embodied in the Declaration of Independence and protected

against the action of the Federal Government by the first amendments were by these later amendments likewise and to an equal extent protected against State action.

The claim is made in a brief filed by the attorney general of the State that the power to pass police regulations is not restricted by any constitutional limitation, and the Slaughter House Cases, 16 Wall., 36; Barbier *vs.* Connolly, 113 U. S., 32; Mugler *vs.* Kansas, 123 U. S., 623, are cited as sustaining this statement. It is not thought necessary to examine this proposition at length. It is true that in some of the cases general language has been used sufficiently broad to justify such an interpretation by the unprofessional reader. The statement is not, however, a correct one in the light of the discussion of the scope and extent of the police powers of the State in their relation to the powers and guaranties of the Constitution, which has gone forward in this court from the time the term police power was first used by Chief Justice Marshall in Brown *vs.* Maryland to the present. This much may now be considered settled.

The regulation of the rates of public service corporations is a proper exercise of the police powers of the States. This power, however, is restricted by the constitutional limitation that such rates must be reasonable. To prescribe and enforce unreasonable rates is to take property without due process of law. The question whether the rates are in fact reasonable is therefore a judicial question.

The States may properly pass any laws deemed essential to the preservation of the public health, morals, and safety. In my judgment the police power, as Chief Justice Marshall used the term, embraced all that mass of subjects not embraced in the grants to the Federal Government. This power, however, even when exercised with reference to such important matters as public health or morals, is subject to the constitutional limitation that the law must be reasonable and not amount to a denial of rights secured to the citizen through the Constitution; for example, inspection

laws may be enacted, but if they are so framed as to be prohibitive of a legitimate article of interstate commerce they are invalid. The decree of the State legislature that the article shall cease to be a commercial article is a *brutum fulmen*. It is again a judicial question whether it is reasonable, and in the beef cases absolutely, and in the liquor, oleomargarine, and cigarette cases to the extent of shipments in the original package and one sale, it is held that such legislation is inoperative as against the commerce clause of the Constitution. It would hardly be contended that if the vegetarians should elect a majority of the members of the legislature of a State and enact a law prohibiting the slaughter, sale, or use of any animals for food products this court would hold such act a valid exercise of the police power in any one of these respects.

Again, the State in the exercise of the same power has the unquestioned right to determine the terms upon which foreign corporations shall do business in the State with its citizens, and what the citizens may do with such company. But there are constitutional limitations upon this power also, as was settled in Allgeyer *vs.* Louisiana. These are all acknowledged limitations upon the police power, and the day has happily passed when this court must sit here to confess itself powerless to repel invasions of the liberty and property of the citizen by State agencies acting under the guise of police regulation. While it will not lightly and without grave cause set aside the deliberate action of the State, yet it will do so unhesitatingly when convinced that the act, either as passed or as construed, invades the property rights of the citizen and is not reasonably necessary to the end to be attained.

It is useless to attempt to follow counsel in his effort to show that an option is gambling *per se*. His discussion of that subject makes it painfully evident that he is unacquainted with commercial transactions as well as with actual gambling in grain. Under the rules of the Board of

Trade as well as the undisputed testimony in this case there can be no settlement on differences in such contracts. The witnesses testified they had never known a case (Record, pp. 20, 24). An option contract, like the one for which the plaintiff in error was indicted, the one involved in Schneider *vs.* Turner, *supra*, the coal contract in Corcoran *vs.* Coal Company, is no more gambling than is the purchase of a stock of goods for resale. One might say of the latter transaction that it is a bet that merchandise will go higher, that there will be a demand for merchandise of that character, etc. To make such assertion would not commend one's discrimination.

To say that options are a common means of gambling is to fly in the face of common knowledge as well as the adjudged cases. Attention has been called to the repeated declaration of the supreme court of Illinois that such contracts were valid at common law and had in them no element of immorality. The authorities showing that such is the universal rule in the absence of proof of intention to settle on differences are stated in Tiedeman's State and Federal Control of Persons and Property, pp. 474, 475, notes.

But this argument is beside the question. The State may destroy option contracts and punish gambling through option contracts, as it does for purchase and sale contracts, by limiting its action to contracts that had the element of gambling in them and its punishments to persons who gamble. It may not take away all right to contract conditionally nor punish the citizen who has done no wrong act. This is not the exercise of the police power; it is confiscation and despotism under the forms of law.

Respectfully submitted.

CHARLES H. ALDRICH,
Of Counsel for Plaintiff in Error.

No. 201.

Brf. of Hamlin v Smith for D.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

Filed Oct. 28, 1901. No. 228

ALFRED V. BOOTH, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Brief and Argument for Defendants in Error.

HOWLAND J. HAMLIN,
Attorney General of Illinois

ELBERT S. SMITH,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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BRIEF.

The statute of Illinois declares:

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market or attempts to do so in relation to any of such commodities shall be fined," &c.

Rev. Stat. Ill., Crim. Code, par. 130.

The legislature of Illinois has full power to pass any laws where not restricted by the provisions of the State or Federal Constitution.

The power of the legislature to pass police regulations is not restricted by any constitutional limitation.

Slaughter-house cases, 16 Wall., 36.
Barbier *vs.* Connolly, 113 U. S., 32.
Mugler *vs.* Kansas, 123 *id.*, 623.

The police power is the general power of the Government to protect and promote the public welfare, *even at the expense of private rights.*

Beer Co. *vs.* Massachusetts, 97 U. S., 25.
Am. & Eng. Encyc. of Law—"Police power."

The police power extends not only to the right to prohibit gambling, but also to prohibit those acts which may be used as disguises for unlawful practices and so have a tendency to injure public interests and degrade the public welfare.

Tiedeman on Lim. of Police Power, sec. 99*a*.
Schneider *vs.* Turner, 130 Ill., 28.
Tenney *vs.* Foote, 4 Ill. App., 594; 95 Ill., 99.
Minnesota Lumber Co. *vs.* Coal Co., 160 Ill., 98.
Pearce *vs.* Foote, 113 Ill., 234.

The General Assembly may by valid enactments—*i. e., by due process of law*—prohibit all things hurtful to the comfort, safety, and welfare of society, even though such pro-

hibition invade the right of liberty or property of an individual.

Town of Lake View *vs.* Rose Hill Cem. Co., 70 Ill., 191.

Magner *vs.* People, 97 Ill., 320.

18 Am. & Eng. Encyc. Law, 739, 740.

With the wisdom, policy, or necessity for such enactments courts have nothing to do.

Booth *vs.* People, 186 Ill., 43.

Laws whose purpose and tendency are to suppress gambling or other crimes are constitutional.

Crandall *vs.* White, 164 Mass., 160.

Where a law operates alike upon all persons and property similarly situated it is not obnoxious to any constitutional provision guaranteeing equal protection to all persons and classes of persons.

Barbier *vs.* Connolly, 113 U. S., 32.

Soon Hing case, *id.*, 709.

Railway Co. *vs.* Humes, 115 U. S., 513.

Hayes *vs.* Missouri, 120 U. S., 68.

R'y Co. *vs.* Mackey, 127 U. S., 205.

R. R. Co. *vs.* Herrick, *id.*, 210.

Walston *vs.* Nevin, 128 U. S., 578.

Magoun *vs.* Bank, 170 U. S., 293.

It is not required the statute shall embrace all kinds of personal property, whether such kinds are the usual subjects of option dealings or not.

State *vs.* Gritzner, 134 Mo., 512.

It is sufficient if the statute embrace those subjects most generally used for the application of option contracts for gambling purposes; and of such subjects the court will take cognizance as a matter of common knowledge.

ARGUMENT.

It is urged by counsel for plaintiff in error that because the act under which the conviction in the case at bar was had, by its terms, prohibits the doing of an act which may in itself be innocent, therefore the law is contrary to that provision of the Constitution which commands that no person shall be deprived of life, liberty, or property without due process of law.

The General Assembly has full authority to pass all laws of a general character whose purpose and tendency are to suppress gambling. "Due process of law" is "the law of the land." The law in question is general, applies to all persons and property similarly situated. Its purpose is to suppress gambling and the doing of certain things that have a tendency to disguise or cover up gambling, and to lead to the unlawful practice, and it is "the law of the land." As said by Mr. Chief Justice Boggs in the opinion of the supreme court of Illinois in this case (186 Ill., 43):

"The State inherently possesses and the General Assembly may lawfully exercise such power of restraint upon private rights as may be found necessary and appropriate to promote the health, comfort, safety and welfare of society."

And this even though the prohibition invade the right of liberty or property of an individual. Also, "Laws for the suppression of all forms of gambling have without exception,

so far as we are advised, been regarded by the courts and law-writers as a proper exercise of the police power."

It not infrequently happens that the good citizen must surrender an innocent (to him) right for the promotion of the general welfare. The police power is not limited to the subject of the health and safety (in its usual sense) of the public.

The comfort and general welfare of others must be regarded. It establishes nothing to say the accused in the case at bar actually accepted and paid for the grain specified in the option denounced. It will be conceded, "corners" in the grain market are obnoxious to the general welfare, and that laws prohibiting them may be enacted.

It is matter of common knowledge—and such common knowledge to those familiar with the business that this court and all other courts having to deal with the subject will take cognizance of the fact without proof—that the purchase of options aids in establishing "corners." It takes so much grain out of the market, if a *bona fide* contract, as effectually as if the grain was actually bought and paid for. The object can thus be accomplished with far less capital. It is another matter of common knowledge, also, that the buyer of options and the one who seeks to establish a corner often buys the grain at the expiration of the option to prevent its being put upon the market and thus break the price. If the buyer has 1,000 options he may actually execute the purchase in 400 for the greater profit he can make in the other 600. Or he may execute all of them by reason of the advantage they have given him, though not his intention in the first instance, for the gain he can make in other deals.

The dealing in options is a "gigantic evil," and it cannot be suppressed, and it will be to the great injury of the State, if the legislature may not pass and the executive authorities enforce the very salutary law now in question.

To suppress evil the individual for his own liberty must yield some rights which but for the public welfare he might otherwise exercise. If it be conceded that in an actual option contract for the purpose of obtaining the subject of the contract there is no wrong, still the occasions for the exercise of that right are so few and the injury (if any) to the individual is so slight that he may well be required to surrender that right that the general welfare may be enhanced.

But the option contract itself can be but a mere wager, in the case at bar, on the price of the grain. Using sophistry as argument cannot change this fact. The purchaser can go on the market and purchase the grain at any time. It is only a question of price. It is pure gambling in the price of grain, and is properly designated by the court a "pernicious evil." There is no occasion for him to pay a price for the option except as a wager on the price. If the price does not change, he can purchase the grain and save to himself the price paid for the option. As shown by the very cases cited by counsel for appellant in the large deals supposed by him, the only purpose of those options is to guard against change in prices, or perhaps with a view of making double profit. They are not made because the dealer wants the grain. In the instances cited the dealer has a large quantity of grain to be sold in one market, and his purchase or sale of options in another market is simply a wager on the price with the expectation that if he loses in

one place he will make in another, or if his confidence is great the deal may be made with the expectation of profit in both markets.

The only effective legislation to prevent gambling in options is a law which prohibits or punishes *all* dealing in options. To say that the law shall be so framed that the prosecutor must enter into and make proof of the workings and intentions of the inner mind of the accused farther than is shown by the act itself which he commits, before he can be convicted, is to say there can be no prohibition of or punishment for dealing in options. As an act within itself, the buying or selling an option is even more meretricious than the actual contract to buy or sell in the future. In the latter case a price is fixed, and there is no uncertainty what shall be paid or received on settling day when the property is delivered. In the former case is no certainty of sale or purchase. From the very nature of the contract, the purchaser risks the amount he pays for the option. If he buys, he must pay the amount paid for the option, in addition to the price of the commodity. If he does not buy, he must lose the amount paid for the option. It requires no superior wisdom to know that if the price goes below the option price, the purchaser will not buy under the option, but if he desires the goods, will purchase elsewhere. In every such case he gambles his option payment against the chance of the rise or fall of the market risked by the opposite party.

Counsel for plaintiff in error seem to argue from a false basis, or to confuse dealing in options with the right of the owner of property to contract to sell and deliver that property for delivery in the future. The right to sell

the property inheres in the right to the property itself. Selling an option is merely taking so much money for giving to another the privilege to exercise in the future—contingent upon the chance of the price going up or down—a right to buy or sell, which right exists in the present without any element of chance in its exercise. To prohibit the evils of option dealing the legislature may prohibit all option dealing. It is the most flagrant of all forms of gambling in grain or stocks.

There may be nothing inherently wrong in a person having in possession a slot machine or other gambling device made for gambling purposes. And yet the law which prohibits having such in possession and imposes a penalty for its violation has been sustained, even though there is no proof that the possessor had used or intended to use the same for gambling purposes.

Bobel *vs.* People, 173 Ill., 19.

The existence of the device with its tendency to encourage gaming is prohibited.

Why not, then, prohibit the dealing in options and the tendency to gaming that may be fostered by it?

The law prohibiting the buying or selling of options is not more objectionable than the law which prohibits a person from selling real or personal property and giving therewith to the purchaser a number giving him the chance to draw some other valuable thing, usually called a "prize." This constitutes a lottery and is unlawful, even though the property may be sold at its fair or usual market price. Such laws are upheld by all the courts, though it may be said as to them, with as much force as in the present case,

that the owner has the right of property and may sell it on any terms he pleases. This must be subject to salutary laws.

We submit that it is within the province of the legislature, without doing violence to the Constitution, to pass laws prohibiting the doing of acts not inherently unlawful which lead to or which may be used to foster and conceal gambling and which may be so done as to constitute gambling.

We most respectfully ask a careful consideration of the opinion of the supreme court of Illinois, delivered through Mr. Chief Justice Boggs, in the case at bar, and reported in 186 Ill., at page 43, and that the judgment of that court be affirmed.

HOWLAND J. HAMLIN,
Attorney General of Illinois, for Defendants in Error.

ELBERT S. SMITH,
Of Counsel.

Supreme Court of the United States.

No. 201.—October Term, 1901.

Alfred V. Booth, Plaintiff in Error, vs. The People of the State of Illinois. } In error to the Supreme Court of the State of Illinois.

[March 3d, 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

By section 130 of the Criminal Code of Illinois it is provided that "whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." *Rev. Stat. Ill. Crim. Code*, § 130.

The defendant was indicted in the Criminal Court of Cook County, Illinois, being charged with violating this statute so far as it related to options to buy grain or other commodities at a future time.

The memorandum of the option purchased by the defendant was as follows:

"B. Al. V. Booth, grain and provision broker.
10 Weare Com. Co. Chicago, *Aug.* 16, 1899.
Sep. corn, 1899. C., 31½. Paid.
Good till close of 'change, Sat., Aug. 26, 1899.
WEARE C. CO.
J. C. C."

The defendant was found guilty and adjudged to pay a fine of one hundred dollars and the costs of the prosecution.

At the trial, by motions to quash the indictment, in arrest of judgment, and for a new trial, the accused insisted that the statute under which he was prosecuted was repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States declaring that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This contention was overruled both in the trial court and in the Supreme Court of Illinois. 186 *Ill.* 43.

There was no dispute as to the meaning of the above memorandum. It meant that on the 16th day of August 1899 the defendant, a grain and provision broker, and the Weare Commission Company made an agreement whereby, in consideration of the sum of ten dollars paid by Booth, he obtained from the company and was given the option of purchasing from it 10,000 bushels of corn at 31½ cents a bushel—the option to remain good until the close of business on the 26th day of August 1899.

In *Schneider* v. *Turner*, 130 *Ill.* 28, 39, the question was whether the statute embraced an agreement in these words: "Chicago, November 11, 1885. In consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Fred W. Peck seventeen hundred and eighty-six shares of the capital stock of the North Chicago City Railway at six hundred dollars per share, if taken on or before the 15th day of December 1885. V. C. Turner."

It was contended that that agreement was not prohibited by the statute; that the legislature only intended to make such option contracts unlawful as were gambling contracts, that is, option contracts that did not contemplate the delivery or acceptance of any property and which only required a settlement by "differences;" whereas, it was insisted, the option there in question had no element of gambling, being only one that entitled the parties obtaining it to elect on or before a named day whether they would buy the stock described in the agreement.

The Supreme Court of Illinois, in that case, observed that at common law all gambling contracts were void, and that an agreement for the sale of property was a mere wager or gambling contract and void, if made with the understanding of the parties that no property was to be delivered or accepted but could be satisfied by an adjustment simply on the basis of the difference between the contract and the market price. It said: "It must be presumed that the object of the legislature was to declare that unlawful which theretofore had been lawful. Prior to this act it was lawful to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. The statute makes them unlawful or void in Illinois."

That such is the scope and effect of the statute in question was recognized by the Supreme Court of Illinois in the present case. *Booth* v. *People &c.*, 186 *Ill.* 43.

Taking the statute to mean what the highest court of the State says it means, is it unconstitutional?

In support of the position that the statute is repugnant to the Fourteenth Amendment, the learned counsel for the plaintiff advance many propositions that meet our entire approval. They cite, as in their judgment controlling, what this court said in *Allgeyer* v. *Louisiana*, 165 *U. S.* 578,

589, namely, that the liberty mentioned in the Fourteenth Amendment "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

These declarations state, in condensed form, principles which had been announced in previous cases, and which may be regarded as expressing the deliberate judgment of this court. But those declarations do not, in themselves, determine the question now presented. When it is said that the liberty of the citizen includes freedom to use his faculties "in all lawful ways," and to earn his living by any "lawful calling," the inquiry remains whether the particular calling or the particular way brought in question in a given case is lawful, that is, consistent with such rules of action as have been rightfully prescribed by the State.

It is however said that the statute of the State, as interpreted by its highest court, is not directed against gambling contracts relating to the selling or buying of grain or other commodities, but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling. The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas*, 123 *U. S.* 623, 661; *Minnesota* v. *Barber*, 136 *U. S.* 313, 320; *Brimmer* v. *Rebman*, 138 *U. S.* 78; *Voight* v. *Wright*, 141 *U. S.* 62.

We cannot say from any facts judicially known to the court, or from the evidence in this case, that the prohibition of options to sell grain at a future time has, in itself, no reasonable relation to the suppression of gambling grain contracts in respect of which the parties contemplate only a settlement on the basis of differences in the contract and market prices. Perhaps, the legislature thought that dealings in options to sell or buy at a future time, although not always or necessarily gambling, may have the effect to keep out of the market, while the options lasted, the property which is the subject of the options, and thus assist purchasers to establish, for a time, what are known as "corners," whereby the ordinary and regular sales or exchanges of such property, based upon existing prices, may be interfered with and persons who have in fact no grain, and do not care to handle any, enabled to practically control prices. Or, the legislature may have thought that options to sell or buy at a future time were, in their essence, mere speculations in prices and tended to foster a spirit of gambling. In all this the legislature of the State may have been mistaken. If so, the mistake was not such as to justify the conclusion that the statute was a mere cover to destroy a particular kind of business not inherently harmful or immoral. It must be assumed that the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means employed were not appropriate to the end sought to be attained and which it was competent for the State to accomplish.

The Supreme Court of the State in this case said: "The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil, and that the suppression of such evil is within the proper exercise of the police power has been too frequently declared to be open to discussion. The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future, in which the delivery and acceptance of the grain so contracted for is *bona fide* contemplated and intended by the parties, but in contracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article. The object to be accomplished by the legislation under consideration is the suppression of contracts of the latter character, which are in truth mere wagers as to the future market price of the article or commodity which is the subject-matter of the wager. Clearly a contract which gives to one of the contracting parties a mere privilege to buy corn but does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for

mere wagers on the price of grain than contracts which create the relation of vendor and vendee. Such contracts are in the nature of wagers, that contracted for being the mere privilege to buy the grain should its market value prove to be greater than the price fixed in the contract for such privilege. The prohibition of the right to enter into contracts which do not contemplate the creation of an obligation on the part of one of the contracting parties to accept and pay for the commodity which is the purported subject matter of the contract, but only to invest him with the option or privilege to demand, the other contracting party shall deliver him the grain if he desires to purchase it, tends materially to the suppression of the very evil of gambling in grain options which it was the legislative intent to extirpate, for the reason such evil injuriously affected the welfare and safety of the public. The denial of the right to make such contracts tended directly to advance the end the legislature had in view and was not an inappropriate measure of attack on the evil intended to be eradicated. So far as that point is concerned, the act must be deemed a valid law of the land, and as such must be enforced, though it infringe in a degree upon the property rights of citizens. To that extent private right must be deemed secondary to the public good." 186 *Ill.* 51.

We are unwilling to declare these views of the State court to be wholly without foundation, and therefore cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question. In reaching this conclusion we have recognized the principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so.

The statute here involved may be unwise. But an unwise enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the West which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But those are suggestions for the consideration of the Illinois Legislature. The courts have nothing to do with the mere policy of legislation.

The judgment of the Supreme Court of Illinois is

Affirmed.

Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.